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In The
Supreme Court of the United States

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MONTANA RIGHT TO LIFE ASSOCIATION; MONTANA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; AND JULIE DAFFIN, PRESIDENT OF MONTANA RIGHT TO LIFE ASSOCIATION
Petitioners,

v.

ROBERT EDDLEMAN, IN HIS OFFICIAL CAPACITY AS COUNTY ATTORNEY FOR STILLWATER COUNTY, MONTANA, AND AS A REPRESENTATIVE OF THE CLASS OF COUNTY ATTORNEYS IN THE STATE OF MONTANA, ET AL.,
Respondents.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. Whether Montana's lowest-in-the-nation $100 limit per contested election on campaign contributions to candidates for the state legislature and other non-statewide offices unconstitutionally violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether Montana's lowest-in-the-nation $200 limit per contested election on campaign contributions to candidates for most statewide offices unconstitutionally violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

3. Whether Montana's $400 limit per contested election on campaign contributions to candidates filed jointly for governor and lieutenant governor unconstitutionally violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

4. Whether Montana's aggregate PAC contribution limit, which prohibits legislative candidates from accepting contributions totaling more than $2,000 in senate races or $1,250 in house races from all political committees combined, unconstitutionally impinges on the freedom of speech, freedom of association, and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Montana Right to Life Association; Montana Right to Life Political Action Committee; and Julie Daffin, President of Montana Right to Life Association; *Plaintiffs-Appellants;*

Defendant Robert Eddelman in his official capacity as the County Attorney for Stillwater County, Montana and as representative of the class of County Attorneys in Montana; Ed Argenbright in his official capacity was the Commissioner of Political Practices for the State of Montana and has been succeeded by Linda L. Vaughey; *Defendants-Appellees.*

CORPORATE DISCLOSURE STATEMENT

In accord with Supreme Court Rule 29.6, Petitioners state that the Montana Right to Life Association is a nonprofit corporation, it has no parent corporation, and there is no publically held company owning 10% or more of stock in it. The Montana Right to Life Political Action Committee is not a corporation, but is an association.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 343 F.3d 1085, (9th Cir. 2003). The opinion of the district court is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 11, 2003. Plaintiffs' Petition for Re-hearing was denied on January 15, 2004. Justice Sandra Day O'Connor of this Court granted Petitioners and extension of their time to file this Petition until May 14, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances. [U.S. Const. amend. I.]

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV, § 1.]

Title 42, Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. [42 U.S.C. § 1983 (2001).]

Mont. Code Ann. § 13-37-216(1)(a) provides:

> Aggregate contributions for each election in a campaign by a political committee or by an individual, other than a candidate, to a candidate are limited as follows:
>
> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $ 400;
>
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $ 200;
>
> (iii) for a candidate for any other public office, not to exceed $ 100.

Mont. Code Ann. § 13-37-218 provides:

> A candidate for the state senate may receive no more than $ 1,000 in total combined monetary contributions from all political committees contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $ 600 in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by the inflation factor [defined elsewhere]. The resulting figure must be rounded off to the nearest $ 50 increment.

STATEMENT OF THE CASE

A. The Proceedings Below.

Petitioners Montana Right to Life Political Action Committee ("MRLPAC"), Montana Right to Life Association, and Julie Daffin, President of Montana Right to Life Association brought this action on October 10, 1996, in the United States District Court for the District of Montana against Robert Eddleman in his official capacity as County Attorney for Stillwater County, Montana, and as representative of the class of County Attorneys in the State of Montana, and against Montana's Commissioner of Political Practices seeking to enjoin enforcement of certain Montana campaign finance statutes:

(1) The per donor contribution limits of Mont. Code Ann. § 13-37-216(1)(a), which limits the contributions that an individual or political committee may contribute to candidates for state elected office. These are set at $400 to gubernatorial candidates, $200 to other statewide candidates, and $100 for all other public offices. These contributions can be made in both the primary and general election only if the candidate has a contested primary.

(2) The "aggregate PAC contribution limits" of Mont. Code Ann. § 13-37-218, which limits the total combined monetary contributions that legislative candidates may receive from all political committees combined. The size of this limitation is adjusted for inflation and at the time of trial was set at $1,250 for house candidates and $2,000 for senate candidates.[1]

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[1] Petitioners also initially challenged other Montana election laws which the district court declared to be unconstitutional in a summary judgment decision that was not appealed.

Following a four-day bench trial held March 27-30, 2000, the district court denied Respondents' claims against both statutes, finding the limits "closely drawn to match the constitutionally sufficient interest in preventing campaign corruption and the appearance thereof." App. at A-57. The United State Court of Appeals for the Ninth Circuit initially affirmed this decision, then withdrew it in response to Respondents' Petition for Rehearing before again affirming on the basis that "[t]he voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their political process," and that "Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny." App. at A-27-28. Judge James A. Teilborg[2] dissented with regards to the aggregate PAC limit, arguing that "Montana's instances of corruption pale by comparison to the facts in *Shrink Missouri*," and "do not demonstrate a serious threat of abuse by all PACs." App. at A-35. He also explained how the aggregate limit seemed a poorly aimed and overly restrictive response to the corruption alleged by the state. App. at A-35, 42-44.

A petition for rehearing or rehearing en banc was subsequently denied and the Ninth Circuit's decision is now being presented to this Court for review.

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[2] The Honorable James A. Teilborg of the United States District Judge for the District of Arizona sat on the panel by designation.

B. The Nature of the Case.

(1) Purpose And Impact Of Per-Donor Contribution Limits

In November 1994, the state of Montana imposed contribution limits prohibiting donors from contributing more than $100 to candidates for either house of the state legislature, $200 to most statewide candidates, and $400 for governor. These limits apply to the entire election cycle unless the candidate faces opposition in both the primary and general election. The limits were enacted by ballot initiative I-118, which, according to its preamble was designed to remedy the problem that "campaigns for political office in Montana have been funded by steadily increasing amounts of contributions from individuals and political committees, with much of those amounts coming from large contributions from a few individuals and political committees; and . . . the average Montanan does not have the funds to make large contributions and is not necessarily represented by the individual or economic interest that does make a large contribution." Excerpts of Record filed in Ninth Circuit ("ExR.") at 758. In the official Voter Information Pamphlet provided to voters at the polls, the argument for I-118 began by stating "[t]here is just way too much money in Montana politics. Passage of Initiative 118 works to solve this problem by: limiting campaign contributions. . . ." ExR. at 518. Throughout both this initial argument and the official rebuttal, the proponents of I-118 argued that "I-118 works to solve the serious problem of too much money in Montana politics." ExR. at 518-21. Neither the preamble to I-118 nor the arguments published in the Voter Information Pamphlet mention any concern that larger contributions might unduly influence politicians, but each instead complained that the rising cost of campaigns was making it possible for the wealthy to influence elections. Id. As the parties stipulated before trial, these two documents express the intent of the drafters of I-118. ExR. at 14.

This initiative was placed on the ballot and promoted by a political action committee named "Lower Election Spending Now," whose executive director, C.B. Pearson, testified for the Defendants at trial as both an expert and fact witness. ExR. at 760. Neither he nor any other witness or document suggested that the passage of this initiative was promoted by any public argument regarding concern that contributions could unduly influence politicians.

These contribution limits replaced previously enacted limits which were already among the lowest in the country as individuals were limited to contributions of $250 for house campaigns, $400 for senate, $1500 for governor, and $750 for other statewide offices, while PACs were limited to $300 for house campaigns, $600 for senate, $8000 for governor and $2000 for other statewide offices. ExR. at 9. According to stipulations in the record, the new limits were set at a level that would have prohibited much of the funds raised by the most recent candidacies for the restricted offices: 50% of the funds raised by each of the major party gubernatorial nominees, 29.5% of the total funds raised by senate candidates, 24.6% of that raised by house candidates, and 28-57% of that raised by various candidates for other statewide office. ExR. at 10-11. The new limits on political committees were actually lower than the average contributions made by such committees in 1992, in the case of gubernatorial contributions barely one-fifth the size of the old average. ExR. at 777-78, 781-82. Following the enactment of these low contribution limits, nearly half of all itemized contributions to legislative candidates have been made at the precise maximum of $100. ExR. at 763.

These limits have proved highly successful at reducing the amount spent on Montana political campaigns as the state's trend of rapidly increasing campaign spending has been reversed. According to the data presented by Defense expert and I-118 director C.B. Pearson, contributions to legislative candidates fell by nearly a third from $1,668,000 in 1994 to $1,126,000 in 1996, recovering only slightly to $1,223,000 in 1998. ExR. at 787. This contrasted with a sixfold increase from $279,000 in 1976. ExR. at 12, 632, 637. The impact was even more dramatic in Senate races, where contributions fell from $641,603 in 1994 to $329,714 in 1998. ExR. at 787. Similarly, contributions to gubernatorial candidates in 1996 was only a third of what it had been in 1992, and contributions in a 1996 Supreme Court race fell to $246,000 from the $358,000 raised in a similar race in 1992. ExR. at 11, 12, 661-63, 781. These reductions have occurred despite increases in the per unit costs of most campaign expenditures. ExR. at 57-58, 93-94, 143. Mr. Pearson supervised a series of more focused studies comparing campaign financing before and after the limits were lowered, and concluded in his first expert report in this case "I-118 reduced the amount of money contributed to and therefore spent on campaigns." ExR. at 655-714, 767.

Besides reducing paid communications, several former candidates testified that these limits had forced them to cut back on personal campaign appearances in order to instead devote additional time to raise necessary funds. ExR. at 146-48, 313, 233-35. For example, Sen. Holden testified that the new limits forced him to spend 75% of his time in 1998 raising funds as an incumbent, whereas he had needed to spend only 50% of his time raising funds in 1994 running as a first time candidate. ExR. at 55-56.

Several witnesses also credited I-118's contribution limits for the dramatic increase in the number of legislators elected without major party opposition. ExR. at 221-23, 225-29, 503. While the 1994 campaign saw both major parties field candidates for all but 18% of the senate seats and 22% of the house seats, by 1998 fully 50% of the senate seats went uncontested, as did 41% of the house seats. ExR. at 503.

In addition to the statistical evidence, several witnesses also described how these limits had severely reduced the funding and communications of specific campaigns, and had kept a substantial number of candidates from mounting effective campaigns. ExR. at 77, 146-49, 153, 791. For example, Mary Jo Fox, manager of Gov. Marc Racicot's re-election campaign in 1996, testified that her candidate could have raised "three to four times as much money" as he actually did had the old limits still been in effect, and that his receipts had declined dramatically from his first campaign in 1992 despite a comparable effort. ExR. at 155-56. Despite this reduction in funds, Ms. Fox testified that the limits had actually helped her candidate get re-elected by preventing an opponent with a dedicated base of support from raising the funds necessary to overcome Gov. Racicot's advantages of name recognition and incumbency. ExR. at 157-58.

(2) Evidence Pertaining To Anti-Corruption Rationale For These Limits.

Neither of the documents stipulated as evincing the intent of I-118's drafter ever suggested that the initiative would prevent anything like money-for-favor corruption. Rather, each touted contribution limits as a means of reducing campaign spending and preventing wealthy donors from influencing elections. I-118 ExR. at 518, 758.

Many witnesses with extensive experience in Montana politics testified that they could not recall a single incident in which a state politician had been accused of acting out of compliance to contributors rather than their obligations of office for at least a dozen years before these limits were enacted. ExR. at 13-14, 58-59, 136-37, 246, 797, 810, 830-31. The lack of a perception of corruption by Montanans was also reflected by its high voter turnout rates, Excerpt at 246-50, which several state witnesses suggested were an important measure of confidence in government as a belief that politicians were influenced by campaign money would cause turnout to decline. ExR. at 216, 288.

(3) The Aggregate PAC Contribution Limit

I-118 also tightened the restrictions of Montana's "aggregate PAC contribution limit" which had been first enacted by the legislature in 1983, and which limits the total amount of money that a candidate can accept from all political action committees combined. At the time of trial, senate candidates could accept a total of $2,000 from PACs, and house candidates could accept $1,250. Once a candidate has "PAC'd out" by accepting the aggregate limit from the various committees that support him, he is prohibited from accepting additional contributions from any other PAC. If the limit is surpassed, he must return enough contributions to reduce his total PAC receipts back below the limit. According to the trial testimony of the lobbyist who chiefly promoted its passage, Jonathan Motl, the purpose of this restriction was to stop "the wave of political committee money coming into Montana." ExR. at 328-30. In Montana, as elsewhere, there are a wide array of PACs, each of which is a "group[] of people with a common agenda who have come together to try to influence the democratic process or the legislative process." ExR. at 251. A campaign contribution from a PAC to a candidate creates an important demonstration of support and association which is often more important than the money itself. For example, Defense witness and long time representative Hal Harper testified that it is often valuable to get contributions from particular PACs in order to "show that that group is supporting you, and that's an obvious indication to members that may identify with that PAC." ExR. at 316. Candidates typically receive contributions from PACs representing a wide range of interests. Some interests are represented by only a single PAC. For example, Plaintiff MRLPAC is the only Montana state PAC that is committed to opposing abortion. ExR. at 117.

The aggregate PAC contribution limit frequently blocks PACs from making this important kind of endorsement, because many candidates "PAC out" early in the campaign and are therefore unable to receive endorsing contributions from additional PACs. Because a single aggregate limit applies to the entire election cycle, a PAC which did not support a candidate who "PACs out" in a contested primary is prohibited from making a contribution to the candidate in the general election. Likewise, a PAC which raises its funds relatively late, or which wishes to monitor the development of races in order to focus contributions where they are most needed may be unable to contribute to its chosen candidates at all because of these limits.

In 1998 Plaintiff MRLPAC made three contributions to candidates which the candidates declined or returned because their contributions from other PACs had already reached the aggregate PAC contribution limit. ExR. at 113-16, 506-515, 789, 800. Candidates Ric Holden, Jay Stovall, and Norman Mills each testified for the record in this case that they would have accepted the contributions that MRLPAC offered but instead declined because they had already accepted the maximum allowed by the aggregate PAC contribution limit. ExR. at 45-46 797, 809. This limit also prevents MRLPAC from providing free use of its mailing list to candidates, forcing them to charge money as a vendor rather than to donate to the candidate as a supporter. ExR. at 115-16.

Montana's aggregate PAC contribution limit has been highly successful in prohibiting PACs from contributing to legislative candidates. This is shown, for example, by the fact that PAC contributions in Montana legislative races remained fairly steady as a share of total contributions at just under 18%, in sharp contrast to other jurisdictions where it has been clearly demonstrated that PAC contributions have risen sharply to levels as high as 60% in neighboring states such as Oregon. ExR. at 637-38. Since I-118 closed the "in kind loophole" in 1994, PAC contributions have now fallen to 12 percent of the total in 1998. ExR. at 445,780. In raw dollars, PAC contributions to legislative candidates have fallen from $193,000 to legislative candidates in 1992 and $247,000 in 1994 to just over $148,000 in each of the 1996 and 1998 campaigns. ExR. at 787. The impact of this restriction is also shown by the fact that roughly 30-40% of all candidates "PAC out,"and by the very fact that the slang term "PAC'd out" has emerged as a well established phrase in the lexicon of Montana politics. ExR. at 154. Several candidates testified that this limit substantially reduced the amount of funds that they were able to raise and spend, and one attributed his narrow defeat to this reduction in funds. ExR. at 45, 795-96, 807.

REASONS FOR GRANTING THE PETITION

This lawsuit raises the question of whether contributions limits can ever be too low to survive First Amendment scrutiny. As issue here is the constitutionality of two aspects of Montana's extraordinarily severe scheme of limiting campaign contributions: its per-donor limits of $100 for non-statewide candidates, $200 for most statewide candidates, and $400 for gubernatorial candidates, and its aggregate PAC contribution limit which caps total contributions from all PACs combined to $1,250 in state house races, and $2,000 in state senate races.

The per donor limits are the lowest imposed by any state in the nation for comparable offices. They were enacted through a ballot initiative, I-118, that was promoted to the public as a means of limiting campaign spending. This goal has been achieved as numerous witnesses credited the new limits with causing the dramatic reduction in campaign spending by Montana legislative and state level candidates that occurred as soon as they went into effect. These witnesses also explained that this reduction in spending has also reduced campaign communications to the point that many voters are never reached by those who seek to represent them. Indeed, testimonial and statistical evidence demonstrated that these limits deter many potential candidates from running at all. In contrast, evidence of an anti-corruption purpose was scant at best.

This case provides the record that was absent in this Court's previous review of a state limit on contributions to candidates. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). In that case, this Court upheld Missouri's $1,075 per election limit on contributions to statewide candidates, but also re-affirmed that such limits could be so low as to create "a system of suppressed political advocacy that would be unconstitutional." *Id.* at 396. Specifically, "the issue in later cases . . . must go to the power to mount a campaign with all the dollars likely to be forthcoming." *Id.* Justice Breyer, joined by Justice Ginsburg, also expressed concern that even the limit in Missouri "low enough to raise [the] question" of whether it "significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from electoral challenge." *Id.* at 404 (Breyer, J., concurring).

The record in this case provides the record evidence that was absent in Missouri, demonstrating both that campaign spending and electoral competition have declined across the board and also explaining the impact on specific campaigns.

Unfortunately, the Ninth Circuit's decision reads *Shrink Missouri* as effectively removing candidate campaign contributions from the protections of the First Amendment. This trend is not limited to this case as the lower courts since the *Shrink Missouri* decision have uniformly upheld limits on what political committees or individuals may contribute to candidates, frequently ignoring evidence that the limits had or would substantially reduce the size and scope of political campaigns. *See Daggett v. Webster*, 205 F.3d 445 (1st Cir. 2000); *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002); *Landell v. Sorrell*, 118 F.Supp. 2d 459 (D.Vt. 2000); *Florida Right to Life, Inc. v. Mortham*, No. 98-770-Civ-Orl-19A (M.D. Fla. Mar. 20, 2000). Notably, each of these case was originally filed before the *Shrink Missouri* decision, and only the *Landell* decision is still pending. Given the cost of establishing the necessary record and the unlikely chance of success based on the precedence of the aforementioned cases, it is unlikely that further opportunities will arise for this Court to correct this trend and re-establish First Amendment protection against over-zealous contribution limitations.

Besides subjecting political committees, or "PACs" to these low per-donor limits, Montana also imposes an aggregate PAC contribution limit that frequently forbids PACs from making an effective contribution of any size. Rather, a candidate's total contributions from all PACs combined may not exceed $1,250 for a house race or $2,000 for a senate race. Once a candidate has "PAC'd out" by reaching the aggregate PAC limit, he cannot accept contributions from additional committees unless an equal amount of previously accepted contributions are returned–thereby rendering the contribution "pointless." *See Shrink Missouri,* 528 U.S. at 397. This limit prohibits donors from contributing to candidates in association with one another. It also acts as a partial spending limit by capping contributions from an entire class of donors–an impact shown to have significantly reduced the funds available to Montana candidates.

This aggregate limit is openly hostile to political committees and hence to political association itself. It treats all such associations as a single entity so that contributions from PACs representing realtors or cattle ranchers can foreclose contributions from a pro-life PAC. Such hostility to political committees is at odds with this Court's jurisprudence "reject[ing] the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protections." *F.E.C. v. Nat. Conserv. PAC,* 470 U.S. 495, 494 (1985). In upholding other campaign finance restrictions, this Court has repeatedly relied on the availability of PACs as a less dangerous alternative to proscribed activities such as corporate contributions and expenditures, *FEC v. Beaumont,* 123 S.Ct. 2200, 2211 (2003); *McConnell v. FEC,* 124 U.S. 619, 694-695 (2003), and large individual contributions. *Buckley v. Valeo,* 424 U.S. 1, 28 n. 31(1976).

I. The Ninth Circuit's Decision To Uphold Such Low Contribution Limits Despite Evidence of Substantial Harm To Political Speech and Electoral Competition Conflicts With The Decisions of The Eighth Circuit Striking Down Comparable Limits as well as the Contribution Limits Analysis Consistently Used By This Court and Others That Have Applied Its Decisions.

This Court has long emphasized that the constitutionality of campaign contribution limits depends largely upon the severity of the harm inflicted on First Amendment rights. It has recognized that all such limits to some degree must "impinge on the protected freedoms of expression and association," *McConnell,* 124 S.Ct at 711, and that such restrictions therefore warrant "heightened scrutiny" which looks to "whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* (quoting *Buckley,* 424 U.S. at 25). Following this standard, it has upheld the constitutionality of limits allowing relatively high contributions of $1,000 or more because they "allow association 'to aggregate large sums of money to promote effective advocacy" and "merely [] require candidates . . . to raise funds from a greater number of persons." *McConnell,* 124 S.Ct. at 656 (quoting *Buckley,* 424 U.S. at 21-22). However, a limit that was "so low as to prevent candidates . . . from amassing the resources necessary for effective advocacy" would "impose serious burdens on free speech." *McConnell,* 124 S.Ct. at 655-656 (quoting *Buckley,* 424 U.S. at 21). It has found that "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression," and has therefore struck down such limits. *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299 (1981).

Although contribution limits can and have been upheld based upon their value in combating corruption or the appearance of corruption, this Court also explained that this justification is not automatic, but that, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *McConnell,* 124 S.Ct. at 711 (quoting *Shrink Missouri,* 528 U.S. at 391). It has therefore held that a $0 contribution limit on minors was unconstitutional because "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny." *McConnell,* 124 S.Ct. at 711.

Following the lead of this Court, most lower courts have struck down comparably low limits, either because they were shown to inflict severe harm on First Amendment rights, because the plausibility of the justification was too attenuated to be supported by the minimal evidence submitted, or a combination of the two. The Eighth Circuit has twice struck down limits of comparable size and effect. *See Carver v. Nixon,* 72 F. 3d 633 (8th Cir. 1995) (invalidating $100-$300 per cycle limits); *Russell v. Burris,* 146 F. 3d 563 (8th Cir. 1998) (enjoining $100-$300 per election limits). The Tenth Circuit has also found that limits of $100-$500 were materially distinct constitutionally from limits exceeding $1,000. *Citizens For Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1183 (10th Cir. 2000). Several district courts have also struck down limits comparable to those at issue here. *Citizens For Responsible Gov't State PAC v. Buckley,* 60 F.Supp.2d 1066 (D.Colo. 1999) *vacated as* *moot Citizens*, 236 F.3d at 1183 (striking down Colorado's limits of $500 and $100 as insufficiently tailored); *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995)(striking down Kentucky's $100 limit as "palpably penal"); *National Black Police Association v. District of Columbia Board of Elections and Ethics*, 924 F.Supp. 270 *vacated as moot* 108 F.3d 346 (D.C.Cir 1997); *see also Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) (striking down Oregon's $500 and $100 limits). Moreover, cases upholding limits smaller than those upheld by this Court have frequently relied upon evidence showing that spending had not declined in campaigns run under the limits. *Daggett*, 205 F.3d at 460; *Landell*, 118 F. Supp. 2d . at 479.[3] *But see City of Akron*, 290 F.3d 813.

In contrast to the cases like *Shrink Missouri* that have presented only the barest evidence of even isolated harm, the record in the present case includes overwhelming evidence that Montana's limits have substantially and systematically reduced political speech, even to the point of harming electoral competition. As set forth in the statement of facts and explained in detail below, this evidence is drawn from two full election cycles of post-limit campaigns involving hundreds of candidates, plus summary analysis of nearly two decades of campaigns conducted under higher limits. ExR. at11-12, 632-637, 787. The drop in spending is directly attributed to contribution limits by multiple witnesses who were intimately involved with the affected campaigns, ExR. at 77, 146-49, 157-58, and even by academic studies supervised by the state's expert witness. ExR. at655-714, 767.

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[3] *Landell* is still pending in the Second Circuit.

II. Montana's Per Donor Limits Are De Facto Spending Limits That Have Severely Reduced The Ability Of Candidates To Communicate With Voters, and the Ninth Circuit's Upholding of Such Limits Conflicts With Decisions of the Sixth and Tenth Circuits That Have Struck Down Candidate Spending Restraints.

Ignoring this Court's warning that "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression," *Citizens Against Rent Control,* 454 U.S. at 299, Montana's contribution limits were plainly designed and promoted to voters as a means of limiting campaign spending by candidates. According to the official Voter Information Pamphlet, "[t]here is just way to much money in Montana politics. Passage of I-118 works to solve this problem by: limiting campaign contributions. . . ." ExR. at518. The preamble to the initiative itself also identified the chief problem as "campaigns for political office in Montana have been funded by steadily increasing amounts of contributions . . ." ExR. at758. The limits were set at a level that would have prohibited contributions that accounted for at least a quarter of the funding for most offices in the prior election, and on which several candidate had relied for more than half of their funding. ExR. at10-11. Additionally, Montana's aggregate PAC limit prevents these funds from being replaced by a proliferation of PACs–the potential for which was a key element of this Court's decision to uphold the federal contribution limits. *Buckley,* 424 U.S. at 28 n.31.

Studies of campaigns conducted after the limits were lowered confirmed that they fulfilled their promise to reduce spending. According to C.B. Pearson, an expert witness for the state who had also headed the Lower Election Spending Now committee that had spearheaded the I-118 campaign, "I-118 reduced the amount of money contributed to and therefore spent on campaigns." ExR. at767. His conclusion was well supported by statistical evidence which showed contributions and spending in the 1996 campaigns to have dropped dramatically compared to prior campaigns for the same offices. For example, gubernatorial contributions declined by two-thirds and state senate contributions dropped nearly in half.

As predicted by this Court, *see Buckley*, 424 U.S. at 19, these reductions in spending have translated directly into a loss of communications. Several candidates or campaign managers testified that their campaigns had been forced to forego important communications due to budget constraints created by these limits. For example, a gubernatorial campaign manager testified that her candidate's television advertising had been cut from two months to one week before the 1996 general election. ExR. at86, 92.

With such sizable reductions and spending and therefore speech, there can be little doubt that these limits have been "so radical in effect as to . . . drive the sound of the recipient's voice below the level of notice." *McConnell*, 124 S.Ct. at 677 (quoting *Shrink Missouri*, 528 U.S. at 397). Montana campaigns were already quite unlike the high-spending affairs familiar at the federal level and in larger states. They are not campaigns that seek to flood airwaves and mailboxes, but instead seek to devout limited resources to informing as many prospective voters as possible of the candidate's basic qualifications, positions, and arguments. Any reduction in these funds necessarily reduces the number of voters whom a candidate can effectively reach.

The Ninth Circuit did recognize that "[i]t is undisputed that the total money contributed to political campaigns . . . has decreased considerably since the challenged measures went into effect." App. at A-19. However, it found that this decline was acceptable because the average funds raised in 1998, $4,465 in house campaigns and $6,869 in senate races were "within the range of money needed to run an effective house campaign." *Id.* In other words, the court found that the First Amendment allowed candidates to be limited to average spending of less than 50 cents per constituent-barely enough for a postage stamp! ExR. at 7.

By upholding a limit on contributions that operate as a candidate expenditure limit, the Ninth Circuit has created a conflict with the decisions of several of its sisters that have consistently struck down restrictions on candidate spending, including contribution limitations that functioned as spending restraints. *Homans v. City of Albuquerque,* No, 02-2244 (10th Cir. April 27, 2004) (striking limits on expenditures by candidates in city elections); *Anderson v. Spear,* 356 F.3d 651, 667 (6th Cir. 2004)(striking down definition of "contribution" that limited candidate's expenditures on their own behalf); *Suster v. Marshall,* 149 F.3d 523 (6th Cir. 1998) (affirming injunction against enforcement of state spending limits on candidates for judicial office); *Kruse v. City of Cincinnati,* 142 F.3d 907 (6th Cir. 1998) (striking down limits on candidate spending in city council elections); *New Hampshire Right to Life Political Action Committee v. Gardner,* 99 F.3d 8 (1st Cir. 1996) (striking down state limit on independent expenditures); *Lincoln Club of Orange County v. City of Irvine,* 292 F.3d 934 (9th Cir. 2002) (striking limit on contributions to independent expenditure committee); *Service Employees Int' Union v. Fair Political Practices Comm',* 955 F.2d 1312, 1322 (9th Cir.

1992) (striking state ban on intra-candidate transfers as an unconstitutional limitation on expenditures); *Landell,* 118 F.Supp.2d 459 (striking down limits on candidate spending in campaigns for state legislative and executive offices).

III. These Limits Reduce Electoral Competition By Depriving Challengers of Needed Communications.

These limits have also been shown to confirm Justice Breyer's concern that too low of a limit could, "significantly increase[] the reputation-related or media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge." *Shrink Missouri,* 528 U.S. at 404 (Breyer, J., concurring). This concern acknowledges that challengers will normally face the harshest impact of contribution limits. As relative newcomers, they need more money than incumbents to achieve the same level of effectiveness-hence a limit that reduces everyone's spending will disparately impact against challengers. Moreover, such candidates also tend to lack broad donor lists and are therefore less able than incumbents to replace the funds lost to contribution limits. Because of these phenomena, a contribution limit which significantly impacts challenger campaigns poses a severe threat to not only the First Amendment but also to the fundamental integrity of the electoral process. While such insulation "cannot be inferred automatically," Justice Breyer did note that Missouri's was "low enough to raise such a question" even though the $1,075 limit at issue in that case was more than five times the size of the $200 limit that Montana places on comparable state-wide campaigns. *Id.* He also explained that the state was not entitled to deference where competent evidence demonstrates the feared effect. *Id.*

Here, the impact of these limits on challengers and thereby upon the electoral process is demonstrated powerfully by the sharp drop in electoral competition since these limits were imposed after the 1994 elections. In the 1994 general elections, the last before the enactment of these limits, there were candidates from both major parties on the ballot for all but 18% of the senate seats and 22% of the house seats. By the next non-presidential election in 1998, after the experiences of a full campaign under the new limits, fully 50% of the senate seats and 41% of the house lacked major party competition. ExR.at 503. Several witnesses blamed this decline on the reduction in contribution limits. ExR.at 221-23, 225-29, 503. Partisan competition was also lower in each house in 1996 and even in 2000 when the onset of term limits produced numerous open seats. ExR. at 155-58. Hence, even in a year in which term limits would have been expected to dramatically enhance the number of competitive races, the number of uncontested senate races was double what it had been before $100 contribution limits were imposed. ExR. at 156-58.

That this reduction in competition is due to the hardships which these limits impose on non-incumbents was demonstrated by the testimony of several veterans of Montana campaigns who expressed concern that these limits made it especially difficult for challengers and other outsiders to raise funds. For example, Sen. Ric Holden testified that his 1994 campaign was successful only because of the generosity of several strong supporters whose contributions would now be severely limited. Without the "seed money" prohibited by these new limits, he believed he could no longer have run an effective campaign as a first time candidate. As an incumbent, however, this "seed money" was less important because his reputation allowed him to attract many donors whom he could not reach as a first time candidate. ExR. at 56-57, 75-76.

That this was a widespread phenomena was confirmed by Rep. Grinde, who explained that his work as a candidate recruiter for the Republican Party introduced him to many potential candidates who had decided not to run due to the burdens imposed by these limits–a problem which has been aggravated by the new, lower limits challenged here. ExR. at 150-52. Rep. Harper, who has played a similar role for Montana Democrats, also admitted that raising sufficient funds "has always been one of the concerns" which discouraged prospective candidates from running for office. ExR. at 302.

In statewide races as well, the manager of Gov. Marc Racicot's 1996 re-election campaign testified that her candidate's primary opponent, Rob Natelson had been prevented from mounting an effective challenge because the $400 limit prevented his small but enthusiastic group of supporters from contributing the funds that Mr. Natelson needed to overcome Gov. Racicot's advantages in beginning name recognition and number of contributors. ExR. at 94-95.

IV. The Anti-Corruption Rationale For Contributions Is Implausible At Such Low Levels, and Is Unsupported By This Record.

The plausibility that contribution limits are needed to combat the appearance of corruption is necessarily reduced as lower levels of contributions are prohibited. Here, the maximum contribution allowed to most Montana candidates is less than the filing fee for this Court! For comparison, Congress has determined that statewide candidates to represent Montana in

Congress can be allowed to accept $5,000 from each political committee in each election-twenty-five times what respondent MRLPAC is allowed to contribute to a candidate for Attorney General running to represent the identical constituency. Similarly, a PAC who made a maximum contribution to every member of the 50-seat Montana senate would only match what it could give a single candidate for Congress. Furthermore, the federal candidate in these examples could accept this maximum contribution twice in a single cycle-once in the primary and once in the general. Montana candidates can do so only if they face competition in both elections.

Regardless of plausibility, the evidence in this case amply demonstrates that these limits were not designed as an anti-corruption measure but as a spending restraint. Indeed, any problem that Montana may have had with large contributions appears to have been amply remedied by the higher limits that these replaced. The parties stipulated before trial that the intent of the drafters of I-118 was expressed by the Preamble and the Voter Information Packet. ExR. at14. Neither mentioned any concern that larger contributions might be used to obtain undue influence over politicians. Even if the intent of the drafters could be distinguished from that of the voters, there was no evidence that the contribution-for-influence concern was ever voiced in the campaign to enact these limits, and there is nothing at all to indicate that anyone voted for them for this purpose.

These limits also target far too many contributions to be an anti-corruption measure. Rather than targeting the handful of large contributions that may stand out sufficiently to suggest a corrosive effect, these limits were drawn to prohibit more than 10% of the contributions that had been given in recent elections, ExR. at770-772,

909. Following the enactment of these lower limits, nearly half of all itemized contributions to legislative candidates are now given at the precise maximum $100. ExR.at 763.

Unlike other jurisdictions reviewed by this Court which had experienced several high-profile scandals involving campaign contributions, *see Shrink* Missouri, 1528 U.S. at 393-394; the state here failed to present evidence of even a single instance in which a state politician had appeared "too compliant to the wishes of large contributors." Furthermore, none of its witnesses were able to cite a single example of any Montana politician being influenced to act by a campaign contributor, and it did not present any other evidence of such a scandal ever having been perceived. Rather, four current or former members of the Montana legislature-including the sitting House Majority leader who had been at the center of many legislative battles, each testified that they were unaware of any legislator ever being influenced by a contribution under either the current or former limits. ExR. at 113-16, 506-515, 789, 800.

None of the evidence relied upon by either the Ninth Circuit or the district court actually suggests a need for such low limits. The only item cited by both courts was the testimony of a veteran legislator that special interests funnel more money into campaigns when key issues arise "because it gets results." App. A-14, A-52. However, a review of this legislator's testimony reveals that contributions are made the election before the legislative vote to help elect friendly legislators. Moreover, the specific examples he cited all took place *after* the new limits had been in effect, thereby illustrating that any ill appearances from these contributions arose due to their source rather than their size. ExR. at 363-369. Other information cites by either of the courts below was similarly flawed, and it is not surprising that each was omitted from the analysis of either the district court or the court of appeals.

What is really significant about the supposed evidence of corruption is its paucity. Despite three and a half years of litigation, a four day trial, and testimony from the chief drafters and promoters of this initiative, the then-sitting secretary of state, the house majority leader, and other veteran legislators and campaign managers, the state failed to uncover a single incident of apparent corruption within more than a dozen years before these limits were enacted. If Montana has such a problem with corruption that it needs the nation's lowest contribution limits to combat it, there should surely be a few examples of at least apparent scandals. Similarly, it is significant that the campaign to enact I-118 never bothered to claim that their initiative would ease any perception of money-for-favors. Surely they would have done so if they thought the people of Montana really believed that their elected officials would sell favors for such a pittance. Combined with the considerable evidence that these limits were designed for the purpose of limiting spending and equalizing resources, this evidence compels the conclusion that these limits are far lower than necessary to satisfy the state's anti-corruption interest.

V. Montana's Aggregate PAC Contribution Limit Renders Contributions Pointless and Thereby Violates the First Amendment

As with the per donor limits discussed above, the Ninth Circuit applied an overly deferential standard towards the aggregate PAC contribution limit. This limit does not limit the size of individual contributions, but instead limits how much can be contributed by all PACs as a group. As a result, individual PACs are frequently barred from contributing entirely. Offering contributions to such a candidate is actually detrimental because it cannot provide the candidate with additional funds but instead forces him to expend some quantity of time and money to refund it or another contribution. Hence, it is actually worse than the "pointless" contributions described as unconstitutional by this Court. *Shrink Missouri,* 528 U.S. at 397. As this Court recently explained, the distinction between contribution bans and limits is an important one that should be considered in applying "closely drawn" scrutiny. *Beaumont,* 123 S.Ct. at 2211. It has since unanimously struck down a federal ban on contributions to candidates from minors. *McConnell,* 124 S.Ct. at 711.

This particular ban is especially egregious because it targets political committees and thereby entirely forecloses the ability to contribute through a non-partisan association. As this Court has explained "[t]here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control,* 454 U.S. at 296. Rather, to place a limit "on individuals wishing to band together to advance their views . . . while placing none on individuals acting alone, is clearly a restraint on the right of association." *Id.*

Unlike restrictions on corporations, this ban does not leave open alternative means of associational contributions but rather blocks the very avenue that make bans on corporate contributions tolerable. *See Beaumont,* 123 S.Ct at 2211. Also unlike corporations, the nature of political committees does not pose special dangers to the political process. *FEC v. Nat. Conserv. PAC,* 470 U.S. 480, 494-495 (1985).

This limits' lack of tailoring was also demonstrated by evidence in this case which showed that political committees are representatives of diverse and often competing interests. For example, Sen. Ric Holden was forced to reject a contribution from Plaintiff Montana Right to Life PAC because he had already "PAC'd out" by accepting contributions from PACs affiliated with agriculture, railroads, contractors, credit unions, water power, life insurance underwriters, medical, affordable housing, gun-owners, petroleum marketers, public employees, RJR tobacco, realtors, Wal-Mart, and wood products. ExR. at 511-12. To view such a limit as an anti-corruption measure requires the implausible assumption that even a $1 contribution from a pro-life PAC can be perceived as corrupting if the candidate has already received his quota of contributions from PACs representing other interests.

Finally, this aggregate limit is essentially a partial spending limit. Unlike per donor limits that push candidates to "raise money from a greater number of persons" in order to "aggregate large sums of money to promote effective advocacy," *Buckley*, 424 U.S. at 21-22, this aggregate limit forecloses contributions from an entire class of donors. If MRTL-PAC cannot contribute to a candidate who is "PAC'd out," the candidate cannot replace the funds by courting other PACs because those contributions are also prohibited.

Indeed, the potential for PAC proliferation was a key factual grounds for upholding the federal contribution limits. *Buckley*, 424 U.S. at 28 n. 31. As this Court explained, the federal law "places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations . . . the potential for proliferation of these sources of contributions is not insignificant. . . ." *Id.* Hence, while this Court in *Buckley* pointed to the potential formation and solicitation of numerous PACs, even representing subsidiaries of the same corporation, as a basis for upholding a per donor contribution limit, Montana shuts off this important source of campaign funding.

Even if some aggregate limit could be justified, Montana's are absurdly low. Federal law allows Congressmen to accept $2,000 from individuals–the same as Montana law allows senate candidates to accept from all PACs combined. The federal limit of $5,000 from each PAC is four times higher than the $1,250 Montana allows all PACs in representative elections. Since the aggregate limit applies to the entire election cycle, a single PAC can actually give eight times more to a federal candidate than a candidate for the Montana house of representative can accept from all PACs combined.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35924
D.C. No CV-96-00165-JDS
OPINION

MONTANA RIGHT TO LIFE ASSOCIATION;
MONTANA RIGHT TO LIFE POLITICAL
ACTION COMMITTEE; JULIE DAFFIN,
President of Montana Right to Life Association,
Plaintiffs-Appellants,
v.

ROBERT EDDLEMAN, in his official capacity as
County Attorney for Stillwater County, Montana,
and as a representative of the class of County
Attorneys in the State of Montana, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
March 7, 2002—Seattle, Washington
Filed September 11, 2003
[Entered September 11, 2003]

Before: Arthur L. Alarcón and Barry G. Silverman, Circuit Judges, and James A. Teilborg, District Judge.*

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* The Honorable James A. Teilborg, United States District Judge for the District of Arizona, sitting by designation.

Opinion by Judge Silverman;
Dissent by Judge Teilborg

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OPINION

SILVERMAN, Circuit Judge:

In 1994, Montana voters passed various campaign finance reform measures contained in a ballot proposition known as Initiative 118. At issue in this case are two of the provisions contained in that initiative. The first lowers the maximum dollar amount both political action committees and individuals may contribute to a political candidate; the second limits the aggregate dollar amount a candidate may receive from all PACs combined. Plaintiffs-appellants brought suit to invalidate some of the measures in Initiative 118, claiming they unduly burdened protected speech and associational rights. After a four-day bench trial, the district court made numerous factual findings and struck down portions of Initiative 118 not at issue here. As to the two provisions challenged on appeal, the district judge upheld them as sufficiently tailored to achieving Montana's important interest in preventing corruption and the appearance of corruption in Montana politics.

We affirm. The district court's factual findings are adequately supported by the record and are not clearly erroneous. Applying these facts to the analytical framework set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), we agree that the two challenged provisions do not violate the First Amendment.

I. Factual Background

In 1994, Montana voters passed Initiative 118, a campaign finance reform scheme containing, among other provisions, two sections that were subsequently enacted as Mont. Code Ann. (M.C.A.) §§ 13-37-216 and -218. The first provision at issue here, M.C.A. § 13-37-216, imposes limits on individual and political action committee contributions to state candidates, the amount of which varies with the office sought. Aggregate contributions for each election in a campaign by a political committee or by an individual, other than a candidate, to a candidate are limited as follows:

> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $400;
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $200;
> (iii) for a candidate for any other public office, not to exceed $100.

Mont. Code Ann. § 13-37-216(1)(a). Because these limits apply to "each election in a campaign," the amount an individual may contribute to a candidate doubles when the candidate participates in a contested primary. While M.C.A. § 13-37-216 lowered the amount of money that individuals and PACs can contribute to candidates, it increased the amount that political parties are permitted to contribute. *Id.* § 13-37-216(3).[1]

The second provision at issue in this appeal, M.C.A. § 13- 37-218, limits the amount that a candidate for the state legislature may receive from all political action committees combined. It provides in pertinent part:

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[1] M.C.A. § 13-37-216(3) reads: "All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the offical ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations from all political party committees: (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $15,000; (b) for a candidate to be elected for state office in a statewide election, other than candidates for governor or lieutenant governor, not to exceed $5,000; (c) for a candidate for public service commissioner, not to exceed $2,000; (d) for a candidate for the state senate, not to exceed $800; (e) for a candidate for any other public office, not to exceed $500."

> A candidate for the state senate may receive no more than $1,000 in total combined monetary contributions from all political committees contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $600 in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by the inflation factor [defined elsewhere]. The resulting figure must be rounded off to the nearest $50 increment.

Id. § 13-37-218. Adjusted for inflation, the PAC contribution ceiling at the time of trial was $2,000 for state senate candidates and $1,250 for state house candidates. Under M.C.A. § 13-37-218, a candidate is permitted to accept additional PAC contributions once the aggregate PAC contribution limit has been reached, provided that he returns funds to earlier PAC donors to make room for later-received contributions. It is important to note that M.C.A. § 13-37-218 does not prevent PACs from contributing to political parties, nor does it prevent PACs from spending money on independent political advertisements or otherwise engaging in political speech. Section 13-37-218 merely limits how much PACs as a group can donate to any one candidate.

The Montana Right to Life Association, Montana Right to Life Political Action Committee, and Julie Daffin, President of the Montana Right to Life

Association (collectively, "MRLA") have all made or attempted to make contributions to Montana legislative candidates. MRLA brought this lawsuit in 1996, challenging six of the campaign finance reform measures contained in Initiative I-118.

The district court granted partial summary judgment to MRLA, declaring four of the initiative's provisions unconstitutional, but left for trial the constitutionality of M.C.A. §§ 13-37-216 and -218. After a four-day bench trial, the district court issued findings of fact and conclusions of law, upholding the two provisions at issue here. The district court relied in part on the testimony of Jonathon Motl, the drafter of the ballot initiative, that I-118 affects only the largest contributions to the various offices. The judge found that the limits imposed by M.C.A. § 13-37-216 "were in the upper 10% of contributions for the particular offices." That is, nine out of ten donations to political candidates were unaffected by this measure.

The district court also found that M.C.A. § 13-37-218, the aggregate PAC contribution limit provision, had the effect of limiting the amount the average candidate received from PACs to about 29% of all contributions received. The court found that, at the time of trial, state house candidates continued to raise an average of $4,464.87, and state senate candidates continued to raise an average of $6,869.04, despite the limits imposed by M.C.A. § 13-37-218. The evidence further showed that the cost of a House race in Montana was between $3,000 and $7,000, and a Senate race between $6,000 and $9,000. The district court thus found that MRLA was unable to demonstrate that the limits imposed left candidates with insufficient funds to run an effective campaign: "[O]utside of bald, conclusory allegations that their campaigns would have been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective." It further found that "there is no indication that the contribution limitations imposed would have any dramatically adverse effect on the funding of campaigns and political associations . . . ."

Applying the standards announced by the Supreme Court in *Shrink Missouri*, the district court ultimately ruled that the State of Montana's political contribution limits were "closely drawn to match the constitutionally sufficient interest in preventing campaign corruption and the appearance thereof." The limits "are not so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." MRLA appeals this ruling.

II. Standard of Review

We review the constitutionality of state statutes *de novo*. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999), *rev'd on other grounds*, 120 S.Ct. 2402 (2000); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003). We review the district court's findings of fact for clear error. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (9th Cir. 2000) (reviewing a district court's findings of fact in a campaign contribution limit case under the "clearly erroneous" standard without discussion); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1316 (9th Cir. 1992) (same). The district court's application of the law to those facts is reviewed *de novo*. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 499 (1984).

III. Supreme Court Decisions Regarding the Constitutionality of Campaign Finance Restrictions

The starting place in the analysis of the constitutionality of campaign finance reform legislation is *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* involved a challenge to the Federal Election Campaign Act. The Act (1) limited individual contributions to any single candidate to $1,000 per election, with an overall annual limitation of $25,000 by any contributor; (2) limited independent expenditures by individuals and groups relative to a clearly identified candidate to $1,000 per year; (3) subjected campaign spending by candidates and political parties to prescribed limits; and (4) required public disclosure of all contributions and expenditures above defined limits.

The *Buckley* Court held that although the provisions limiting contributions to candidates were constitutional, the provisions limiting expenditures by candidates were invalid, violating candidates' freedom of speech. *Id.* at 20-21. With respect to the contribution limitations, the Court made three important observations. First, regarding a contributor's right to free speech, the effect of the contribution limitation was minimal:

> A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing ... *A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.*

Id. (emphasis added).

Second, regarding the effect on a candidate's free speech rights, the *Buckley* Court held that contribution limits are constitutional as long as they do not prevent candidates from "amassing the resources necessary for effective advocacy." *Id.* at 21. If a candidate is merely required "to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression," the candidate's freedom of speech is not impugned by limits on contributions. *Id.* at 21-22.

Finally, the *Buckley* Court observed that the main concern raised by contribution limitations was whether they interfered with a contributor's right of association. *Id.* at 24-25. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id.* at 22. Recognizing that freedom of political association is a "basic constitutional freedom," the Court held that restrictions on that right are subject to the "closest scrutiny." *Id.* at 25. The Court was careful to note, however, that "neither the right to associate nor the right to participate in political activities is absolute . . . . Even a significant interference may be sustained if the State demonstrates a sufficiently important interest and employs a means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (citations and internal quotation marks omitted).

The Supreme Court reaffirmed the principles announced in *Buckley* when it upheld a state campaign contribution limitation in *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377 (2000).[2] *Shrink Missouri* involved a Missouri statute that imposed contribution limits ranging from $275 to $1,075, depending on the office or size of the candidate's constituency and accounting for inflation. *Id.* at 382. The Shrink Missouri Government PAC and an unsuccessful candidate for state auditor sued to enjoin enforcement of the statute, claiming that it violated the First and Fourteenth Amendments

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[2] MRLA's reliance on *Vanatta v. Keisling,* 151 F.3d 1215 (9th Cir. 1998); *Service Employees Int'l Union,* 955 F.2d at 1312; and other Ninth Circuit cases interpreting *Buckley* fails to recognize the impact of the Supreme Court's superceding decision in *Shrink Missouri.*

Upholding the statute as constitutional, the *Shrink Missouri* Court emphasized *Buckley*'s holding that "a contribution limit involving a 'significant interference' with associational rights could survive if the Government demonstrated that the regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine-tuned.' " *Id.* (citations omitted). *Shrink Missouri* also stressed that courts considering contribution limits, as opposed to expenditure limits, need not be overly concerned with the precise standard of scrutiny to be applied because, in general, "limiting contributions [leaves] communications significantly unimpaired," and "contribution limits . . . more readily clear the hurdles before them" than would analogous expenditure limits. *Id.* at 387-88.

Shrink Missouri recognized that *Buckley* "specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." *Id.* at 397. Rather, the Court said that the outer limits of constitutional contribution limitations are defined by whether the limitation is so low as to impede a candidate's ability to "amass the resources necessary for effective advocacy." *Id.* at 397. The question to be asked in evaluating laws that limit campaign contributions, then, is whether "the contribution limitation is so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.*

Recently, in *FEC v. Beaumont,* 123 S. Ct. 2200 (2003), the Supreme Court reaffirmed the principles enunciated in *Buckley*. The Supreme Court noted that "[g]oing back to *Buckley* . . . restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *Id.* at 2210.

[1] The bottom line is this: After *Buckley* and *Shrink Missouri,* state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn" — i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign. With these principles in mind, we now turn to whether Montana's campaign limits pass muster under *Buckley* and *Shrink Missouri.*

IV. M.C.A. § 13-37-216, limiting individual and PAC campaign contributions, is constitutional.

A. The State of Montana presented sufficient evidence of its asserted interest in avoiding corruption or the appearance of corruption.

Montana asserts that the campaign contribution limitation on individuals and PACs is necessary to avoid corruption or the appearance of corruption in Montana politics. MRLA does not dispute that this interest is sufficient to justify campaign contribution limits. Rather, it argues that the limits imposed are unnecessarily stringent and there is no evidence that restricting contributions to such small amounts is needed to combat corruption.

This, however, is not the appropriate inquiry. The correct focus under *Shrink Missouri* is whether the state has presented sufficient evidence of a valid interest, not whether it has justified a particular dollar amount. The latter inquiry, if ever appropriate, occurs in the second part of our analysis, in examining whether the restriction is "closely drawn." *See, e.g., California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1292 (E.D. Cal. 1998) ("[A]s a general matter, the court will not second guess a legislative determination as to where the line for contribution limits shall be drawn."). With respect to whether Montana has presented sufficient evidence of corruption or the appearance of corruption, we agree with the district court that it has.

[2] A state's interest in preventing corruption or the appearance of corruption is not confined to instances of bribery of public officials, but extends "to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Missouri,* 528 U.S. at 389. With respect to the quantum of evidence necessary to justify this interest, the Supreme Court has required only that the perceived threat not be "illusory," *Buckley,* 424 U.S. at 27, or "mere conjecture," *Shrink Missouri,* 528 U.S. at 392. The amount of evidence needed will thus "vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. The *Shrink Missouri* Court found sufficient evidence of the potential of contributions to corrupt simply in a state senator's statement that contributions had the "real potential to buy votes," a smattering of newspaper articles reporting large contributions, and the fact that 74% of Missouri voters determined that contribution limits were necessary. *Id.*

The evidence presented by the State of Montana in this case is sufficient to justify the contribution limits imposed, and indeed carries more weight than that presented in *Shrink Missouri*.

The record contains the testimony of a 30-year veteran of the Montana legislature who stated that special interests funnel more money into campaigns when particular issues approach a vote "because it gets results." The state also pointed to a 1981 incident in which a Republican state senator dispatched a letter to his colleagues urging them to vote for passage of a bill favoring variable annual annuities to ensure that a highly disproportionate share of PAC contributions from the insurance industry continued to flow to the Republican party. The letter read in part:

> Please destroy this letter after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the demos to know about it! In the last election they gave $8000 to state candidates . . . . Of this $8,000 – Republicans got $7000 – you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp.

The Montana press published the contents of the senator's letter. Although the author of the letter was ultimately cleared of wrongdoing, the letter and attendant publicity spawned five separate investigations.

[3] A 1982 poll indicated that 78.3% of Montana voters believe money is synonymous with power. Another 69% of Montanans say that elected officials give special treatment to individuals and businesses that make large contributions. The district court found that MRLA had offered no evidence that Montana voter suspicion or perception was to the contrary. Moreover, MRLA is incorrect to suggest that our reliance on such evidence is impermissible. In *Shrink Missouri,* the Court relied, in part, on similar evidence: the result of a

referendum election relating to contribution limits. *See Shrink Missouri,* 528 U.S. at 394. *Cf. Atkins v. Virginia,* 122 S.Ct. 2242, 2248-50 (2002) (relying on public consensus as evidence of what constitutes cruel and unusual punishment in a death penalty case). Taken together, the evidence presented below suffices under *Shrink Missouri* to establish Montana's interest in avoiding corruption or the appearance of corruption. The state's interest is neither illusory or conjectural.

B. M.C.A. § 13-37-216 is "closely drawn" to avoid unnecessary abridgment of associational freedoms.

MRLA also challenges M.C.A. § 13-37-216 as insufficiently tailored to the state's interest in preventing corruption, arguing that it prevents candidates from amassing needed resources, discriminates against challengers, and unconstitutionally prohibits both small and large contributions. We disagree.

[4] A campaign contribution limitation is "closely drawn" if it

> focus[es] on the narrow aspect of political association where the actuality and potential for corruption have been identified— while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist in a limited but nonetheless substantial extent in supporting the candidates and committees with financial resources.

Buckley, 424 U.S. at 28. In examining whether a contribution limitation is sufficiently tailored to a state's asserted interest, the focus is as much on those aspects of associational freedom unaffected by the law as the limitations that are imposed. We are mindful that the dollar amounts employed to prevent corruption should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397. In making this determination, we look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, *id.*, and we also consider factors such as whether the candidate can look elsewhere for money, *Buckley*, 424 U.S. at 21-22, the percentage of contributions that are affected, *Daggett*, 205 F.3d at 461, the total cost of a campaign, *id.*, and how much money each candidate would lose, *id.*

[5] We agree with the district court that the state's contribution limits are closely drawn to further its interest in preventing corruption and the appearance of corruption. The district court found that the contribution limits affect only the top 10% of contributions, and that the percentage affected includes the largest contributions. As the testimony of the statute's drafter, Jonathon Motl, makes clear, this finding was not clearly erroneous. MRLA's contention that M.C.A. § 13-37-216 unconstitutionally prohibits both small and large contributions is thus without merit.

[6] In addition, M.C.A. § 13-37-216, while decreasing PAC and individual contributions, simultaneously increased the amount of money political parties may contribute to a candidate, almost doubling the amount that may be contributed in some races. The statute also did not limit the amount a candidate may give to himself, or the number of individuals from whom he can seek contributions. Candidates can therefore look elsewhere for forms of funding unaffected by the limitations imposed by M.C.A. § 13-37-216. Moreover, the statute in no way prevents PACs from affiliating with their chosen candidates in ways other than direct contributions, such as donating money to a candidate's political party, volunteering individual members' services, sending direct mail to their supporters, or taking out independent newspaper, radio, or television ads to convey their support.

[7] The evidence before the district court showed that the State of Montana remains one of the least expensive states in the nation in which to run a political campaign. Montana's 100 house districts average only 7,991 people, its 50 senate districts 15,981 people. Legislative candidates in Montana campaign primarily door-to-door, and only occasionally advertise on radio and television. It is undisputed that the total money contributed to political campaigns in the State of Montana has decreased considerably since the challenged measures went into effect. The parties agree that, of the money raised in the 1992 legislative election, before M.C.A. § 13-37-216 was enacted, 24% to 30% came from contributions that would now violate the new limits. That alone, however, does not make the contribution limits unconstitutional. Indeed, the *Shrink Missouri* Court upheld contributions limits despite a decrease of more than 50% in total spending in Missouri elections, nearly twice the decrease present here. *See Shrink Missouri*, 528 U.S. at 426 n.10 (Thomas, J., dissenting). The district court found that the average amount raised by a Montana house candidate in 1998, with the challenged limits in effect, was $4,464.87, a figure well within the range of money needed to run an effective house campaign. The same is true for the $6,869.00 average raised by state senate candidates. We cannot agree with MRLA that the challenged limits have impeded candidates' campaigns to such an extent that speech and associational rights have been impermissibly abridged.

[8] As the district court found, Montana candidates remain able to mount effective campaigns, a primary concern in our inquiry. MRLA, however, presented the testimony of three candidates who claimed that the new limits preclude effective campaigning. We agree with the district court that this evidence is unpersuasive. Two of the witnesses raised more money *after* the enactment of M.C.A. §13-37-216 than before, two were successfully elected to their positions, and the one losing candidate admitted that his absence during a pivotal campaign period prevented him from raising sufficient funds to win. Another MRLA witness, a campaign manager for a successfully elected Montana legislator, acknowledged that her candidate won with a $70,000.00 surplus of funds. We fully agree with the district court's conclusion that, apart from "bald, conclusory allegations that their campaigns would have

been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective."

It is true that the contribution limits imposed by M.C.A. § 13-37-216 are some of the lowest in the country. This is unsurprising in light of the fact that Montana is one of the least expensive states in the nation in which to mount a political campaign. As long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits. *See, e.g., Shrink Missouri,* 528 U.S. at 388 ("[T]he dollar amount of the limit need not be fine tuned.") (internal quotations omitted).

MRLA also claims that the state's argument, that a candidate can campaign through less expensive means, is unpersuasive if the candidate is unable to mount the same type of campaign he could have run without the limit. This ignores the point emphasized in both *Buckley* and *Shrink Missouri* that a limit on what others can give a candidate is fundamentally different from a limit on what a candidate can spend. Limitations on candidates' expenditures are viewed as direct restrictions on speech, while contribution limits are only rarely seen as restrictions on donors' First Amendment rights. Under the standards articulated for contribution limits in *Buckley* and *Shrink Misouri,* MRLA cannot argue that Montana's contribution limits impermissibly alter a candidate's message, or result in a different kind of campaign as compared to when the limits did not exist. Rather, MRLA must show that limiting donations prevents candidates from amassing the resources necessary for effective advocacy, making a donee candidate's campaign to be not merely different but ineffective. This MRLA has not done.

Finally, MRLA, noting that 40-50% of legislative seats went uncontested in the 1998 campaign, argues that the contribution limits unconstitutionally discriminate against challengers. This assertion fails for two reasons. First, while imposing contribution limits, M.C.A. §13-37-216 also contains a provision preventing incumbents from using excess funds from one campaign in future campaigns. Such a provision keeps incumbents from building campaign war chests and gaining a fund-raising head start over challengers. The record shows that the average gap between the total amount of money raised by incumbents and challengers for all legislative races was only $65.00 per race. Second, *Buckley* squarely held that, without a record of "invidious discrimination against challengers as a class," there is "no support for the proposition that an incumbent's advantages [are] leveraged into something significantly more powerful by contribution limitations applicable to all candidates, whether veterans or upstarts." *Shrink Missouri,* 528 U.S. at 389 n.4. Accordingly, MRLA's argument is without merit.

[9] Because individuals and PACs remain "free to engage in independent political expression, to associate actively through volunteering their services, and to assist in a limited but nonetheless substantial extent in supporting the candidates and committees with financial resources," *Buckley,* 424 U.S. at 28, we agree with the district court that M.C.A. §13-37-216 is constitutional.

V. M.C.A. § 13-37-218, imposing an aggregate limit on PAC contributions to state legislative candidates, is constitutional.

We now turn to the aggregate limit on PAC contributions. M.C.A. § 13-37-218 provides:

> A candidate for the state senate may receive no more than $1,000 [now increased to $2,000] in total combined monetary contributions from all political committees contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $600 [now $1,250] in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by the inflation factor [defined elsewhere].

MRLA argues that the statutory limits on what a candidate may receive from all PACs unconstitutionally discriminates against PACs, unconstitutionally prohibits certain contributions entirely, impermissibly functions as a candidate spending limit, and is not tailored to any legitimate state interest.

A. The aggregate PAC limit is justified by a sufficiently important interest and does not unconstitutionally discriminate against PACs.

[10] MRLA argues that M.C.A. § 13-37-218 unconstitutionally discriminates against PACs as opposed to individual donors. However, the differential treatment of PACs is constitutionally permissible where, as here, that treatment is necessary to serve a substantial government interest. *See Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972) ("The crucial question is whether there is an appropriate government interest suitably furthered by the differential treatment."). The State of Montana contends that the aggregate PAC limit is justified by the state's concern over the corrupting influence of PAC money on campaigns. If the record demonstrates that the danger of corruption, or the appearance of such a danger, is greater when dealing with PAC money as opposed to other contributions, then the state's justification is constitutionally sufficient. *See, e.g., Austin v. Michigan Chamber of Comm.,* 494 U.S. 652, 658-60 (1990) (prevention of corruption justification sufficient to justify differential treatment of corporations).

[11] The district court found that the aggregate PAC limits are "essential" to preventing undue influence and the appearance of undue influence by special interest groups. As noted above, this finding is supported by a quantum of evidence that more than exceeds that found sufficient in *Shrink Missouri.* The most damning evidence was the letter from a state senator urging legislators to vote for a bill in order to

keep insurance industry PAC money in the Republican camp. It is true that the investigations spawned by the letter did not result in criminal charges, but that is not the test. The voters of Montana were entitled to view the widely-publicized letter as unwholesome and indicative of the corrosive influence of PAC money on the legislative process, as they apparently did.

This view was echoed by veteran legislator Hal Harper, who testified that, in general, PACs funnel money into state legislative campaigns only when their interests are at stake in order to "get results." This testimony, like that of Missouri Senator Wayne Goodein, who stated that large contributions have "the real potential to buy votes," *Shrink Missouri*, 528 U.S. at 393, speaks not to particular PACs but to the potentially corrosive effects of special interest groups in general, and the corresponding justification for government actions to counteract such effects.

Many courts have recognized that the danger of corruption in the political system is greater with respect to PAC contributions than it is for individuals. *See, e.g., Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997) (upholding a law to combat corruption by placing greater restrictions upon direct corporate and PAC contributions to political candidates, and lesser restrictions upon individual contributions); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 489 (D. Vt. 2000) ("[T]he anti-corruption rationale . . . is arguably even stronger when applied to PAC contributions . . . . As their name suggests, PACs exist in order to affect certain political action. The likelihood of actual quid pro quo arrangements between PACs and candidates is high.").

One court has even explicitly held that, due in part to the disproportionate influence of special interests on a candidate's campaign, aggregate PAC limits are constitutionally permissible. *Gard v. Wisconsin State Elections Bd.*, 456 N.W.2d 809, 820 (Wis. 1990).

[12] MRLA argues that the State's interest in preventing corruption and the appearance of corruption does not justify the aggregate PAC limit because M.C.A. §13-37-218 does not differentiate on the basis of the size of any individual PAC's contribution. This ignores the fact that the size of an individual PAC's contribution is already limited by M.C.A. § 13-37-216. The two provisions before us work hand-in-glove to avoid corruption and the appearance of the same by reducing the impact of PAC money on Montana's elections, thereby encouraging candidates to have a diverse base of support. The district court found that the aggregate PAC limit was justified in part because otherwise PACs could easily evade the individual contribution limits by contributing the statutory maximum through a multitude of individual committees. Like the district court, we find this justification persuasive. Accordingly, we hold that the aggregate PAC limit is justified by a sufficiently important state interest and does not unconstitutionally discriminate against PACs.

B. The aggregate PAC limit is closely drawn to serve the state's anti-corruption purpose.

MRLA argues that M.C.A. § 13-37-218 is not sufficiently tailored to the state's anti-corruption interest, preventing some PACs from contributing anything at all. The argument goes like this: If a candidate for, say, state senate has already accepted $2,000 in PAC money, he has "PAC'd out," and other PACs are now prevented from contributing and can no longer express their support for the candidate. The flaw in this argument is that it fails to recognize that, under the Montana scheme, a candidate can return some money from one PAC to make room for other PAC money. For example, in our hypothetical, suppose the senate candidate received twenty contributions of $100 each from twenty different PACs, thus reaching the aggregate $2,000 limit. If a twenty-first PAC wished to make a $100 contribution, and if the candidate wished to accept it, the candidate could refund $100 (for example, by returning five dollars to each of the other twenty PACs) to make room for the new contribution. What matters is that so long as a candidate wants a PAC involved in funding his campaign, Montana's law does not infringe on the PACs' associational freedoms. A candidate is free to manage his PAC contributions so as to be able to accept contributions from an unlimited number of PACs, allowing them to show their support for candidates they back and participate in the electoral process.

Furthermore, M.C.A. § 13-37-218 does not prevent PACs from otherwise affiliating with a candidate in ways other than direct contributions. PACs can continue, for example, to volunteer services to a candidate's campaign, to endorse a candidate, to independently buy advertising in support of a candidate, etc.

[13] It is important to recognize that the aggregate PAC limit does not directly affect a candidate's speech. A candidate is free to obtain additional money from other sources, including an unlimited number of individual donors, the candidate's own funds, and the candidate's political party. Moreover, a PAC may still donate to political parties without limitation. As the district court found, even with the aggregate PAC limit imposed, PAC contributions comprised nearly a third of candidates' total campaign funds in the last election. Clearly, PACs still play a significant role in Montana political campaigns, and MRLA's attempts to characterize M.C.A. § 13-37-218 as stifling PACs' voices in Montana elections are unconvincing. The limits imposed by Montana voters are not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 387-88, 397. We therefore agree with the district court that M.C.A. § 13-37-218 is constitutional.

VI. Conclusion

[14] The voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their electoral process. *See FEC v. Beaumont*, 123 S. Ct. 2200, 2208, 2209 (2003). Our analysis in reviewing such initiatives is highly factintensive and relies heavily on the factual findings made by the district court in the wake of a four-day bench trial, findings that have ample support in the record and are not clearly erroneous. Applying these facts to the

analytical framework set forth in *Buckley* and *Missouri Shrink,* we hold that Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny, and that M.C.A. §§ 13-37-216 and -218 are closely tailored to achieving those ends. We therefore affirm the district court and hold that these statutes are constitutional and do not violate the First Amendment.

AFFIRMED.

TEILBORG, District Judge, Dissenting in Part:

Under *Buckley,* contribution limitations can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo,* 424 U.S. 1, 25 (1976). I agree with the majority that Montana has a sufficiently important interest in preventing corruption and the perception of corruption in Montana elections. I do not disagree with the majority in upholding the individual contribution limits placed on individuals and PACs. Such limits are closely drawn to the significant interest of preventing improper influence, and quid pro quo arrangements arising from large contributions. As intended, the individual limits target the upper 10% of contributions.

Where I depart from the majority is on the constitutionality of the aggregate PAC contribution limit. I disagree that the State has demonstrated a "genuine threat to its important governmental interests" or has "employ[ed] means closely drawn to avoid unnecessary abridgment" of protected activity. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 302 (1981) (Blackmun, & O'Connor, J.J., concurring) (internal quotation marks omitted).

The Supreme Court has previously defined corruption as "a subversion of the political process" where "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("NCPAC"). I agree that Montana has a significantly important interest in preventing corruption associated with large contributions. However, I submit that large individual contributions from persons and PACs have been addressed by Montana's individual contribution limits as set forth in Mont. Code Ann. § 13-37-216 (2001). I find that having a limit on the amount an individual PAC may contribute to a candidate sufficiently prevents any one PAC from exerting "unfair influence" over a candidate. Nevertheless, the State has chosen to enact an aggregate PAC contribution limit to prevent a candidate from being overly influenced by special interests generally. The predicate for such a position must necessarily be that all PACs operate with a monolithic agenda. This ignores the obvious. Like individual persons, each PAC has its own interests and its own reasons for contributing. There is no evidence to support a proposition that all PACs exert unfair influence, or are collectively capable of doing so. I conclude that not only has the State failed to demonstrate a genuine threat, i.e., that all PAC contributions exert an unfair influence over candidates to justify the State's interest in preventing perceived and actual corruption, but the State has also failed to employ means closely drawn to that interest.

I. Inadequate evidence exists to sustain the aggregate limit.

While states should be permitted to respond to potential electoral deficiencies "with foresight rather than reactively," the response must not significantly impinge on constitutionally protected rights. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). To sustain the aggregate PAC contribution limit, we must find under the present law a serious threat of abuse exists from collective PAC special interest contributions. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001).

Here, Montana's asserted purpose for the aggregate PAC limit is to prevent a candidate from being overly influenced by special interests.[1] The majority finds that the State's evidence of isolated incidents speaks not to particular PACs but to the nature of special interest groups in general. From this narrow evidence, the majority concludes that the regulation is necessary to limit the total amount of PAC contributions and encourage a diverse base of support in order to "eliminate the corrosive effects of large amounts of special interest money." It appears that Montana and the majority equate all special interest contributions with corruption without any evidentiary support.

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[1] It is worth observing that the term "special interest" seems to be used in the pejorative sense by Montana, even to the point of subtly equating it with corruption. In a democracy, every thoughtful voter and financial supporter (large or small) represents a "special interest." It is only when a particular interest becomes a corrupting one that the state can claim an interest which justifies regulation.

Because the aggregate limit discriminates between PACs and individuals, the "discrimination itself [must be] necessary to serve a substantial governmental interest." *Arizona Right to Life PAC v. Bayless,* 320 F.3d 1002, 1010-11 (9th Cir. 2003). Moreover, while some courts have recognized that the potential danger of corruption is greater with respect to PAC contributions than with individuals, I find that the State has failed to demonstrate a serious threat of influence by all PACs in Montana to justify the aggregate limit or that the discrimination between PACs and individual donors is necessary to serve a substantial governmental interest. Even if one assumes there are instances of abuse by particular PACs, an aggregate limit on PAC contributions is no more justified than an aggregate limit on all individual contributions to regulate abuses by a particular contributor. Notably, in striking down a criminal statute limiting PAC expenditures, the Supreme Court observed that even if the large pooling of financial resources by PACs poses a potential for corruption or the appearance of corruption, a PAC expenditure limit is overly broad. *See NCPAC,* 470 U.S. at 498. It applies not only to "multimillion dollar war chests," but equally to "informal discussion groups that solicit neighborhood contributions." *Id.*

By contrast, in upholding a limitation on corporate contributions and independent expenditures, the Supreme Court in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990), specified that the "mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditure restriction]; rather, the unique state-conferred corporate structure . . . warrants the limit on independent expenditures." The Court upheld the limitation on corporation expenditures based on the inherent structure of the corporation – a structure which exists in all corporations. Here, as in *Vannatta v. Kiesling*, the State is unable to point to any evidence which demonstrates that *all* PAC contributions inherently lead to the sort of corruption that Montana purportedly seeks to prevent. 151 F.3d 1215, 1221 (9th Cir. 1998) (holding unconstitutional a contribution limit on out-of-district residents because it was not closely drawn to advance the goal of preventing corruption).

Interestingly, in footnote 2, the majority concludes that *Vannatta* and another case, *Service Employees Int'l Union*, 955 F.2d 1312 (9th Cir. 1992), were "superseded" by *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). The majority's dismissal of *Vannatta* and *Service Employees*, is inconsistent with *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*). In *Miller*, the court addressed "when, if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue." *Id.* at 899. The court concluded that intervening Supreme Court authority "need not be identical," but the decision "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable.*" *Id.* at 900 (emphasis added).

Neither *Vannatta* nor *Service Employees* is clearly irreconcilable with *Shrink Missouri*. As discussed in more detail below, the volume of evidence presented in *Shrink Missouri* to justify its individual limits was substantial. *See, e.g.*, 528 U.S. at 393-94. That factor alone is sufficient to distinguish *Shrink Missouri* from *Vannatta* where the court found that the State had failed "to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." *Vannatta*, 151 F.3d at 1221.

Similarly, *Service Employees* is distinguishable from *Shrink Missouri* because the former involved, among other things, an outright ban on certain types of campaign contributions, while the latter only involved limits on contributions. In finding a ban on inter-candidate contributions unconstitutional, the court in *Service Employees* noted that " [t]he potential for corruption stems not from campaign contributions *per se* but from large campaign contributions." 955 F.2d at 1323. The majority does not explain how that decision is inconsistent, much less clearly irreconcilable, with the Supreme Court's decision in *Shrink Missouri* upholding individual contribution limits. *See Shrink Missouri*, 528 U.S. at 387-89.

Moreover, under both *Vannatta* and *Shrink Missouri*, actual evidence is required; mere conjecture that special interest money corrodes politics in Montana is inadequate to carry a First Amendment burden. *See*

Shrink Missouri, 528 U.S. at 392; *Vannatta,* 151 F.3d at 1221.[2] Nevertheless, the majority finds that the evidence here exceeds the evidence presented in *Shrink Missouri.* I disagree. In *Shrink Missouri,* the State presented an affidavit from a state senator who expressed that large contributions have " 'the real potential to buy votes.' " *Id.* at 393 (quoting *Shrink Mo. Gov't PAC v. Adams,* 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998)). There were newspaper accounts of large contributions supporting inferences of impropriety. One such account examined the state treasurer's decision to engage in substantial state business with a bank which contributed $20,000 to the treasurer's campaign. *Shrink Missouri,* 528 U.S. at 393. Another report disclosed a $40,000 contribution from a brewery and one for $20,000 from a bank to a candidate for state auditor. *Id.* A PAC linked to an investment bank contributed $420,000 to candidates in northern Missouri; three scandals ensued including one involving a state representative who was " 'accused of sponsoring legislation in exchange for kickbacks.' " *Id.* (quoting *Carver v. Nixon,* 72 F.3d 633, 642, and n. 10 (8th Cir. 1995)). Another resulted in Missouri's former attorney general pleading guilty to charges of conspiracy to misuse state property after being indicted for using a state worker's compensation fund to benefit campaign contributors. *Shrink Missouri,* 528 U.S. at 393-94. Finally, " 'an overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.' " *Id.* at 394 (quoting *Carver v. Nixon,* 882 F. Supp. 901, 905 (W.D. Mo. 1995)). These instances of actual and perceived corruption based on large contributions sufficiently justified the individual limits upheld in *Shrink Missouri.*

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[2] As noted by the majority, the Supreme Court's recent decision in *FEC v. Beaumont,* 123 S.Ct. 2200 (2003) reiterates many of the important principles set forth in *Buckley* and *Shrink Missouri,* including the standard for review. "[A] contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont,* 123 S.Ct. at 2210 (internal quotation marks omitted).

Not only do Montana's instances of corruption pale by comparison to the facts in *Shrink Missouri,* in my opinion, they simply do not demonstrate a serious threat of abuse by all PACs to justify an aggregate limit on PACs while simultaneously raising the amount political parties may contribute to a candidate. Montana cites a memorandum by a Republican legislator as evidence of corruption in the Montana legislature. The memorandum states that the legislator wants to keep the particular PAC money within the Republican party and not allow that money to be shared with Democrats. Although five separate investigations were conducted, no convictions, or even indictments ensued. Thus, this incident does not justify a restriction placed on PACs generally. It is ironic that the State cites this episode as a justification for restraining aggregate PAC contributions to candidates, when it can be cited as powerful evidence of PAC influence on political parties, parties to which this very legislation permits PACs to make unlimited contributions. As discussed below, this anomaly simply dramatizes how inadequately tailored this law is to prevent a supposed corruption of Montana politics.

Montana also cites efforts by the gambling industry to prevent the passing of an automatic system of monitoring video gambling and efforts by the electric power industry to deregulate prices as examples of corruption associated with PAC contributions. Without any evidence of quid pro quo arrangements or other illegal or improper conduct, Montana asserts that these "results" are manifest examples of undue influence by PAC money. I find that this evidence is at most inconclusive.

Next, the State points to a poll of voters in support of campaign reform as evidence of perceived corruption. This poll did not specifically address PACs or special interest groups. Even if it did, I question whether a poll of the constituents is sufficient evidence, or is even probative to show the existence of perceived corruption. Issues of fundamental freedom should not be decided by majority vote, much less by a public opinion poll; thus, the poll results here should not be considered by the panel. The Tenth Circuit noted that "[w]e should not allow generic public dissatisfaction to support the restriction of political speech." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1230 n.6 (10th Cir. 2000), *rev'd on other grounds,* 533 U.S. 431 (2001) (citing *NCPAC,* 470 U.S. at 499-500) ("newspaper articles and polls purportedly showing a public perception of corruption" are insufficient to justify a limitation on the independent expenditures of PACs).[3] In *NCPAC,* the Supreme Court implicitly affirmed the district court's exclusion of the proffered evidence of newspaper articles and polls purportedly showing a public perception of corruption as irrelevant. 470 U.S. at 499. Likewise, in an Eighth Amendment challenge to capital punishment for 16- and 17-year-old offenders, the Supreme Court "decline[d] the invitation to rest constitutional law upon such uncertain foundations" as public opinion polls. *Stanford v. Kentucky*, 429 U.S. 361, 377 (1989). The panel should follow the Supreme Court's dictate to reject public opinion polls on issues of constitutional importance.[4]

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[3] Conversely, in *Daggett v. Commission on Governmental Ethics and Election Practices,* 205 F.3d 445, 457 (1st Cir. 2000), under the guidelines of *Shrink Missouri,* the First Circuit Court of Appeals relied on a poll as evidence of corruption and the appearance of corruption. Similarly, the district court in *Landell v. Sorrell,* 118 F. Supp. 2d 459, 469, 478 (D. Vt. 2000), relied on polling information to demonstrate an erosion of public confidence, noting that "[t]ypical barometers of citizen concern such as polls and media coverage" have been used by many other courts in reviewing the governmental interest in enacting contribution limits.

Finally, the State relies on low voter turnout to demonstrate the negative impact on public perception created by the involvement of large amounts of PAC money in political campaigns. I agree that voter turnout may be a better measure of the constituency's perceived corruption of elections. The Supreme Court, however, has noted that the fact that the voters passed the initiative to establish contribution limits is not dispositive; "majority votes do not defeat First Amendment protections." *Shrink Missouri*, 528 U.S. at 394. Montana enjoys one of the five highest voter turnouts in the country. (ER 246). Although the State asserts that nearly half of the eligible voters in Montana did not vote in the 1998 general election because they lacked faith that their vote made a difference, the record does not reflect increased voter confidence post-reform.

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[4] The majority in *Compassion in Dying v. State of Wash.*, 79 F.3d 790, *amended by* 85 F.3d 1440 (9th Cir. 1996), *cert. granted by Washington v. Glucksberg*, 518 U.S. 1057 (1996), *rev'd by* 521 U.S. 702 (1997), relied on public opinion polls to determine the current societal attitudes as one factor in deciding whether a liberty interest in physician assisted suicide exists. That case is distinguishable. Here, the Supreme Court has already recognized an important state interest in preventing perceived corruption. *See Buckley*, 424 U.S. at 26-27. Rather than relying on public opinion polls to determine whether an important state interest exists to prevent perceived corruption, here the State seeks to offer public opinion polls as evidence of perceived corruption. As Judge Trott's dissent notes,"[t]he Constitution's explicit provisions for amendment rely on the government process, not on random sampling of public opinions. Polls are for the other branches of our government, not for the judiciary." *Compassion in Dying*, 85 F.3d at 1449 (Trott, J., dissenting). Similarly here, such reliance on public opinion polls on issues of constitutional significance is improper and unnecessary.

Thus, the State fails to justify the need for the aggregate PAC contribution limit, in addition to the individual PAC limit, in order to prevent the type of corruption or perceived corruption that allegedly exists in Montana. Based on the inconclusive evidence of undue influence by PAC contributions in the record, the individual PAC limit more than suffices to prevent any undue influence on legislators caused by large contributions. I have found no basis for concluding that PACs are generally corrupt or perceived to be corrupt, nor any justification for further restricting PAC participation in legislative campaigns.

II. The limit is not closely drawn to avoid unnecessary abridgement of First Amendment freedoms.

The majority concludes that there is sufficient justification in the record to demonstrate that the danger of corruption (or the appearance of corruption) is greater when dealing with PAC money as opposed to other contributions. Assuming that PACs are perceived to be a source of corruption, the State's goal of encouraging a diverse base of support is thwarted when the State places a limit on the aggregate amount of PAC contributions a candidate may receive. By instituting such a limit, the State has, unjustifiably, restricted PAC participation in legislative campaigns and unnecessarily abridged their associational freedoms.

To be "closely drawn," the degree of restriction must bear a sufficiently close relation to the reasons proffered by the State. We must consider whether, "within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59, 67 (1988) (deciding whether the degree of discrimination is closely drawn to the State's reasons in the Privileges and Immunities clause context); *see also Elrod v. Burns*, 427 U.S. 347, 363 (1976) ("to survive constitutional challenge, [the encroachment of First Amendment protections] must further some vital government end by a means that is *least restrictive* of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.") (emphasis added).

The State argues that by placing an aggregate limit on PAC contributions, candidates obtain a more diverse base of contributions and thereby prevent undue influence by special interests. However, the State fails to demonstrate that PAC contributions, when individually limited to $400/$200/$100 depending on the office, are not sufficiently curtailed to alleviate a perception of corruption or a danger of undue influence. The State contends that large amounts of special interest money have a corrosive effect on Montana politics. It fails to show that PACs in general create a perception of corruption. I acknowledge that courts have found that the danger of corruption is greater with PAC contributions than with individuals. Such a determination may justify individual limits to combat quid pro quo arrangements from large contributors, but it does not justify an overbroad aggregate PAC limit that does little more than restrict speech and association rights.

Unlike *Shrink Missouri,* where individual PAC contributions are limited to a certain amount based on the specified state office or size of constituency, here aggregate PAC contributions are capped and a candidate must give back a portion of its PAC collections in order to receive contributions from another PAC. Clearly, Montana's aggregate limit has a more restrictive effect than the contribution limits upheld in *Shrink Missouri*. This restrictive effect is meaningful for purposes of determining whether the State has demonstrated that the aggregate limit is closely drawn to match a sufficiently important interest. *See Beaumont,* 123 S.Ct. at 2211 ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider [the difference] is when applying scrutiny at the level selected . . . ."). This demonstrates that the State has not employed the least restrictive alternative in furthering its purpose. *See Service Employees,* 955 F.2d at 1312 (rejecting ban on inter-candidate contributions where the ban did not distinguish on the basis of the size of the donation).

Montana has asserted that corruption (or perceived corruption) exists when PAC contributions make up a large portion of a candidate's campaign treasury, but has not made a closely drawn determination of what portion of a candidates' contributions is "large" enough to create the perception of corruption. Rather, Montana has made an arbitrary determination of what amount of PAC money is allowed, without regard to the ratio of PAC money to other contributions.

While the district court found that the aggregate PAC contribution limit has lowered the amount of PAC money to about 29% of all contributions received by the average candidate, the same result can be achieved when a candidate receives more individual contributions or party contributions, rendering PAC contributions a smaller portion of the candidates' campaign collection. Thus, Montana's aggregate PAC contribution limit arbitrarily restricts more First Amendment rights than necessary without achieving any appreciable goal.

Veteran legislator Hal Harper testified that PACs funnel money into state legislative campaigns only during elections when their interests are at stake. It seems obvious to me that the perception of corruption would be lessened if legislative candidates accepted contributions from PACs on both sides of the issue. A candidate would then have a more diverse base of support to combat the perception of corruption, instead of being precluded from accepting contributions from a competing side because the candidate is "PAC'd out."

The State's chosen means is neither closely drawn, nor effective to achieve a diverse base of contributions. If a candidate "PACs out," a candidate may collect PAC money "funneled" through a party, but from no or very few individuals. This leads to the same supposed corrosive effect of large amounts of special interest money in legislative elections (or the large proportion of PAC money that makes up a candidate's contributions) which Montana seeks to eliminate. As referenced above, the memorandum by the Montana Republican legislator demonstrates that PAC money may allegedly corrupt or be perceived to corrupt candidates as well as political parties.[5] Placing a limit on the amount PACs can contribute to an individual candidate, but not placing a limit on PAC contributions to a party and simultaneously increasing the amount a party can contribute to a candidate, will tend to encourage circumvention of the statute and possibly create the corruption that Montana seeks to prevent. As the majority noted, a PAC may donate to political parties without limitation. I submit that the aggregate restriction is little more than an arbitrary limitation which substantially impinges on PACs' rights of association and free speech.

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[5] Montana cites as evidence of corruption or perceived corruption complaints from the 1988 election relating to alleged illegal transfers made by the national Republican Party and the Montana Republican Party. (ER 344, 830). The Supreme Court recognized that "political parties also share relevant features with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will 'work to further' a particular 'political agenda,' which activity would benefit from coordination with those candidates." *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 624 (1996) (citation omitted). Thus, the aggregate PAC contribution limit is not narrowly tailored to achieve Montana's goal of eliminating the influence of large amounts of money in Montana politics.

While I recognize that the aggregate limit allows candidates to return some PAC money to make room for other PAC contributions, the reality of the limitation is that candidates, such as Senator Ric Holden, are forced to reject contributions and to refrain from soliciting contributions from other PACs which would otherwise support a candidate. (*See* ER 511-12). While the candidate can return some money in order to receive other contributions, there is no incentive for the candidate to do so. A real risk exists that the candidate will not be able to replace the funds he returns, thereby creating even less incentive to refund PAC money already collected. (*See* ER 45, 795-96, 807). If the purpose of the restriction is to increase the support base of candidates, why is the State making it more difficult for a candidate to receive contributions from multiple PACs?

While the majority applauds the restriction for not imposing a restraint on a candidate's speech, I am not convinced that the associational rights of PACs have not been unnecessarily abridged. The majority's example of this refund system demonstrates the likely encroachment. If a candidate for the senate has already accepted $100 from each of twenty different PACs, and wishes to accept a $100 contribution from another PAC, the candidate would need to return $5 to each of the other twenty PACs. The amount available to the candidate will not change regardless of whether he accepts the twenty-first PAC's contribution. The act of refunding $5 to each of twenty PACs every time the candidate would like to receive another PAC's contribution would cause the sheer logistics of the process to discourage the candidate from accepting that twenty-first contribution.

As a result, when a candidate rejects a contribution that he would otherwise have accepted but cannot because he has "PAC'd out" and does not or cannot refund money "to make room for the contribution," the rejected PAC's associational rights have been abridged.[6] Although this may not be a direct result of the State's action, an indirect abridgement of associational rights is just as obnoxious. *See Buckley*, 424 U.S. at 65 (the Court applies strict scrutiny even when "any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . .").

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[6] Although the majority finds that PACs may contribute to a candidate's campaign through other means such as volunteering services, endorsing the candidate or independently buying advertising in support of the candidate, I do not find less corruption or less perceived corruption merely by distinguishing between direct monetary contributions and indirect contributions to a candidate's campaign. What the majority fails to recognize is that influence over a candidate may come in forms other than monetary contributions. In addition, PACs may decide that they "may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the [PAC];" therefore, depriving PACs of that choice is an abridgement of associational freedoms. *Shrink Missouri*, 528 U.S. at 416-17 (Thomas, J., dissenting) (citing *Colorado Republican*, 518 U.S. at 636 (Thomas, J., concurring in judgment and dissenting in part)); *see also Federal Election Comm'n. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Shrink Missouri*, 528 U.S.at 418 (Thomas, J., dissenting) (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988)).

CONCLUSION

I do not question the legitimacy of the State's interest to prevent corruption and perceived corruption. The State asserts that in order to prevent corruption or the perception of corruption, it must limit the amount of influence special interests exert over candidates. The State fails to provide evidence of corruption or a genuine threat of corruption by PACs as a monolithic group. Furthermore, the State asserts that the limit is closely drawn to its interest in preventing corruption by PACs; however, it increases the amount a political party may contribute to a candidate without imposing any restriction on the amount a PAC may contribute to a political party. In addition, the State seeks to prevent PAC contributions from forming a large portion of a candidate's contributions without first defining what constitutes a "large portion" and instead chooses an arbitrary limit without regard to the ratio of PAC contributions as compared with other contributions. Finally, the State asserts that no associational freedoms have been unnecessarily abridged because if candidates "PAC out," the candidate may refund some PAC money to make room for the other PAC money. In reality, the unintended result is that it limits the number of PACs who can participate in political speech without affecting the amount of PAC money involved in Montana's legislative elections. Based on the foregoing, I conclude that the aggregate PAC limit fails the *Buckley* standard. Accordingly, I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

JUDGMENT IN A CIVIL CASE
CV 96-165-BLG-JDS

Montana Right to Life Assoc.,
Montana Right to Life Political Action Committee;
Julie Daffin, Pres. of MT Right to Life Assoc.,
Plaintiffs,

v.

Robert Eddleman, in his official capacity as County Attorney for Stillwater County, MT, and as a Representative of the class of district attorneys in the State ff Montana, and Ed Argenbright, in his official capacity as Commissioner of Political Practices for the State of Montana,
Defendants.

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has returned its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that Court finds that Montana Code Annotated, Sections 13-37-216 and Sections 13-37-218 pass constitutional muster. Plaintiffs' cause of action as it relates to these two claims is dismissed with prejudice.**

(FINDINGS OF FACTS AND CONCLUSIONS OF LAW ATTACHED)

Dated: September 19, 2000

Lou Aleksich, Jr.
CLERK

/s/
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 96-165-BLG-JDS

MONTANA RIGHT TO LIFE ASSOCIATION;
MONTANA RIGHT TO LIFE POLITICAL ACTION
COMMITTEE; JULIE DAFFIN, President of
Montana Right to Life Association,
Plaintiffs,
vs.

ROBERT EDDLEMAN, in his official capacity as
County Attorney for Stillwater County, Montana, and
as a representative of the class of District Attorneys in
the State of Montana, and ED ARGENBRIGHT,
in his official capacity as Commissioner of
Political Practices for the State of Montana,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came to trial before the Court, sitting without a jury.

At issue is the constitutionality of Montana Code Annotated Section 13-37-216, which imposes limitations on the aggregate contributions for each election in a campaign by a political committee or by an individual to a candidate, and Montana Code Annotated 13-27-218, which limits the amount of aggregate contributions candidates for state senate and state house may accept from all political committees. In-kind contributions are included in computing the limitations imposed by Mont. Code Ann. § 13-37-218.

Many of the detailed facts of this case are set forth in the consolidated final pretrial order and order on summary judgment. As a result, the Court finds it unnecessary to engage in a lengthy factual recitation.

Discussion

Plaintiffs challenge the following Montana Code Annotated Sections which read, in relevant part:

> 13-37-216. Limitations on contributions
>
> (1)(a) Aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:
>
> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $400;
>
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $200;
>
> (iii) for a candidate for any other public office, not to exceed $100.
>
> * * *
>
> (5) For purposes of this section, "election" means the general election or a primary election that involves two or more candidates

for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

13-37-218. Limitations on receipts from political committees.

A candidate for the state senate may receive no more than $1,000 in total combined monetary contributions from all political committees contributing to his campaign, and a candidate for the state house of representatives may receive no more than $600 in total combined monetary contributions from all political committees contributing to his campaign. The foregoing limitations shall be multiplied by the inflation factor as defined in 15-30-101(8) for the year in which general elections are held after 1984; the resulting figure shall be rounded off to the nearest $50 increment. The commissioner of political practices shall publish the revised limitations as a rule. In-kind contributions must be included in computing these limitation totals. The limitation provided in this section does not apply to contributions made by a political party eligible for a primary election under 13-10-601.

The current limits adjusted for inflation are $2,000 for state senate and $1,250 for state house.

Contribution limits may survive if the government demonstrates that the challenged regulations are closely drawn to match a sufficiently important interest. Buckley v. Valeo, 424 U.S. 1, 25, 30 (1976); Nixon v. Shrink Missouri PAC, 120 S. Ct. 897, 904 (2000). However, the dollar amount of the limit need not be fine tuned. Id. The prevention of corruption and the appearance of corruption is a constitutionally sufficient justification for imposing contribution limits. Buckley, 424 U.S. at 25-26.

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent."

Buckley, 424 U.S. at 27, quoting Civil Service Commission v. Letter Carriers, 413 U.S. 548, 565 (1973).

In many respects this case is indistinguishable from Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897 (2000). Like their Missouri counterparts, citizens of Montana were of the opinion that large campaign contributions result in at least the appearance of improper influence in the political system. This conclusion is supported by the sound passage of the challenged statutes, citizen initiatives, which in 1994 were approved by Montana voters by a 61% to 39% margin. While a majority vote cannot defeat First Amendment protections, see Shrink, 120 S. Ct. at 908, it certainly confirms the belief of the majority of voters; that contribution limits were necessary to combat improper influence, or the appearance thereof, resulting from large campaign contributions.

The perception held by a majority of Montana voters was further confirmed by the testimony of the chief election official for the State of Montana, Secretary of State Mike Cooney, Montana Representative and candidate for Secretary of State, Hal Harper, and attorney and campaign reform activist, Jonathan Motl, all who were of the opinion that poor voter turnout and lack of participation by citizens in government stems, in large part, from public perception that special interests (large contributors) control government. Representative Harper, with 30 years in the Montana legislature to his credit, testified that "in my time I've seen efforts put into hiring more lobbyists and funneling more money into campaigns when certain special interests know an issue is coming up, because it gets results." Accordingly, there exists more than just voter speculation that money results in improper influence or the appearance thereof.

The Shrink Court also noted that the closest the party attacking the contribution limits came to challenging the implications of Buckley's evidence was their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' positions. This is precisely the tact taken by the plaintiffs in this case who presented the testimony of John Lott, a senior research scholar in economics at Yale University. Dr. Lott's testimony can be summed up, in large part, as follows; people give money to candidates or elected officials who value the same things that the person giving the money does. However, this is not inconsistent with Buckley and it's progeny. Buckley "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." Shrink, 120 S. Ct. at 905. This broader threat specifically includes politicians who value the same things as their contributors.

In response, the defendants offered the testimony of Thomas Stratmann, an economist, who opined that when legislators receive increasing contributions over time they are more likely to vote in the interests of the giver. Dr. Stratmann also opined that special interest groups do not give that much to legislators who they know will clearly vote in their favor or legislators who are clearly opposed to them. Instead, Dr. Stratmann found that special interests tend to contribute most to those politicians who fall in between those two categories - legislators who are undecided.

Shrink reaffirmed what Buckley found over twenty years ago, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." Shrink, 120 S. Ct. at 908. Plaintiffs offered no evidence that Montana voter suspicion or perception was to the contrary. In this case the prevention of corruption and appearance of corruption is a constitutionally sufficient justification for interfering with First Amendment associational and speech rights.

The evidence also leads the Court to conclude that the contribution limits imposed effect only "large" contributions by the standards of Montana elections. Jonathan Motl, the drafter of I-118, looked at the historical data of what individuals gave to candidates for public office in the State of Montana and chose a limit that he defines as the "largest contribution limit level for any of those offices." The limits arrived at by Motl, and approved by Montana voters, were in the upper 10% of contributions for particular offices. The data presented by the defendants, exhibit D-24, supports Motl's conclusions. These figures were not rebutted by the plaintiffs.

The PAC receipt limit was enacted in 1983 and includes an automatic adjustment for inflation. The current limits are $2,000 for state senate and $1,250 for state house. The average amount raised for a state house campaign in Montana in 1998 was $4,464.87. The average amount raised for a state senate campaign in Montana in 1998 was $6,869.04. Thus, in 1998 Mont.

Code Ann. § 13-37-218 limited an average state house candidates to receiving 28% of her contributions from political committees and an average state senate candidate to receiving 29% of her contributions from political committees.

The PAC receipt limits are designed to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance thereof. Without a limitation on the amount a candidate could receive from political committees, the contribution limitations could be easily evaded by special interests contributing the maximum amount to a candidate through a multitude of committees. Moreover, even after a candidate in Montana has reached the PAC limit, she can still receive an unlimited amount of money from other individuals and from the candidates own sources. The Court finds that the PAC limits are essential in order to prevent undue influence, and the appearance thereof, of special interests on a candidate's campaign. The Court's conclusion is further supported by the fact that, based upon the average amounts raised for state senate and house campaigns, political committees were able to contribute almost 30% such campaigns. This Court considers one-third of a politician's campaign money to be a large percentage.

Two of plaintiffs witnesses, Montana State Legislators Larry Grinde and Ric Holden, testified that they had to work harder and talk to more people in order to raise the same amount of campaign money. While this may be true, it is precisely the purpose behind contribution limitations; for candidates to acquire a broad and diverse base of support to eliminate undue influence, or the appearance thereof, from large contributors and special interests.

Both legislators also testified that contribution limits made it difficult for them to run "an effective campaign." However, outside of bald, conclusory allegations that their campaigns would have been more "effective" had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective. The Court also notes that while these candidates testified that they could not run effective campaigns, all who testified won the respective state legislative races in which they took part.

To establish the unconstitutionality of the challenged limitations, the plaintiffs must show that the limitations are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Nixon v. Shrink Missouri Government PAC, 120 S. Ct. at 909. The plaintiffs have failed to so show. Here "there is no indication that the contribution limitations imposed would have any dramatically adverse effect on the funding of campaigns and political associations and thus no showing that the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy." Buckley, 424 U.S. at 21; Shrink, 120 S. Ct. at 908-909. The data, as demonstrated by exhibit D-24, mandates such a conclusion. Despite the complained of limitations, candidates in Montana continue amass the resources necessary for effective advocacy.

The Court finds that the challenged statutes are closely drawn to match the constitutionally sufficient interest in preventing campaign corruption and the appearance thereof. The limits are not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."

Based on the foregoing, the Court finds that Mont. Code. Ann. §§ 13-37-216 and 13-37-218 pass constitutional muster. Plaintiffs' cause of action as it relates to these two claims is dismissed with prejudice.

The Clerk of Court shall forthwith notify the parties of the making of this Order.

Dated this 19th day of September, 2000.

/s/
Chief, United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35924

ORDER

[Entered January 15, 2004]

MONTANA RIGHT TO LIFE ASSOCIATION, et al.,
Plaintiffs-Appellants,
v.

ROBERT EDDLEMAN, in his official capacity as County Attorney for Stillwater County, Montana, and as a representative of the class of County Attorneys in the State of Montana, et al.,
Defendant-Appellee.

Before: ALARCÓN, SILVERMAN, Circuit Judges, and Teilborg, District Judge.

Judge Silverman has voted to reject the petition for rehearing en banc and Judge Alarcón so recommends. Judge Teilborg recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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No. 03-1550

Supreme Court, U.S.
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In The
Supreme Court of the United States

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MONTANA RIGHT TO LIFE ASSOCIATION;
MONTANA RIGHT TO LIFE POLITICAL ACTION
COMMITTEE; and JULIE DAFFIN, President of
Montana Right to Life Association,

Petitioners,

v.

ROBERT EDDLEMAN, in his Official Capacity as
County Attorney for Stillwater County, Montana, and as
Representative of the Class of County Attorneys
in the State of Montana, et al.,

Respondents.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Montana's contribution limits are closely drawn to match the important governmental interest of preserving the integrity of the political process by eliminating corruption, and the appearance of corruption, from candidate elections.

2. Whether Montana's aggregate contribution limit from political action committees impermissibly discriminates against the speech and association rights of political action committees in violation of the First and Fourteenth Amendments.

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STATEMENT OF THE CASE

Petitioners Montana Right to Life Association, Montana Right to Life Political Action Committee, and Julie Daffin, president of the Montana Right to Life Association, challenge the constitutionality of Montana's contribution limits and aggregate PAC contributions for candidates to the Montana legislature. Respondents Robert Eddleman, in his official capacity as County Attorney for Stillwater County, Montana, and a representative of the class of County Attorneys in the State of Montana, defended the constitutionality of the limits. The district court, the Honorable Jack D. Shanstrom presiding, held a four-day trial at which both sides presented evidence.

The district court found that Montana's contribution limits targeted only the "upper 10% of contributions for the particular office." (Apps. 6, 54; ER 770, 771.) Despite the contribution limits, the district court found that state legislative candidates continued to raise money well within the average cost of a state house race in Montana of $3,000 to $7,000, and the average cost of a state senate race of $6,000 to $9,000. (Apps. 6, 54.) As a result, the district court found that Petitioners had failed to demonstrate that the limits left candidates unable to run effective campaigns: "[O]utside of bald, conclusory allegations that their campaigns would have been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective." (Apps. 7, 56.)

This conclusion should come as no surprise in Montana elections where legislative candidates campaign primarily door-to-door in an effort to reach voters in the average house district of 7,991 people and the average senate district of 15,981 people. (App. 18.) Legislative candidates only occasionally advertise on radio and television (App. 18) and the only evidence presented to the district court regarding the cost of television advertising indicated that a thirty-second political spot costs $54. (ER 54.)

Besides the relatively inexpensive costs of political campaigns in Montana, the district court also found that the doubling of the allowed limit for political parties to contribute to candidates, contained within Mont. Code Ann. § 13-37-216, helped candidates run effective campaigns. (App. 18.) The ability of political parties to contribute larger amounts of money, combined with the ability of candidates to spend unlimited amounts of their own money and seek contributions from an unlimited number of persons and sources, have combined to enhance the ability of challengers to match incumbents in spending. The average gap between challengers and incumbents in legislative races has narrowed to $65 per race. (App. 21.) This narrowing of spending power may help explain why Montana maintains a robust and competitive election system, as evidenced by the fact that the 2000 election saw a record number of total candidates run in state elections in Montana and the fourth highest ever number of legislative candidates. (ER 315, 229.)

With respect to the aggregate PAC limit, the district court found the current limits of $2000 for a state senate candidate and $1250 for a state house candidate to be justified, in part, to prevent PACs from evading the individual contribution limit by contributing the statutory maximum through a multitude of individual committees. (Apps. 23, 55.)

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REASONS FOR DENYING THE PETITION

The Court's decision in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), shifted the analysis to be employed by district courts in reviewing challenges to contribution limits. Courts no longer must engage in net present value calculations to determine whether a state's contribution limits comport with the $1,000 federal standard upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976). Nothing in the Court's recent decision in *McConnell v. FEC*, ___ U.S. ___, 124 S. Ct. 619 (2003), calls the validity of this analysis into question.

Not surprisingly, no court has struck down campaign contribution limits since the *Shrink* decision. *See, e.g.*, *Daggett v. Webster*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's contribution limits of $250 for state legislative candidates); *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000) (upholding Vermont's contribution limits of $200 for state house candidates, $300 for state senate candidates, and $400 for statewide candidates, including governor). This outcome results, in large part, from the *Shrink* Court's directive that reviewing courts should consider the facts and circumstances of the locale in which the contribution limits apply. In other words, the reviewing court should consider whether "the contribution limitation is so radical in effect to render political association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397.

In this case, the district court evaluated Montana's contribution limits in the context of a factual record developed over four days of trial. The evidence presented to the district court showed that Montana remains one of the least expensive states in the nation in which to run a political campaign with average cost of a state house race falling between $3,000 and $7,000, and a state senate race costing between $6,000 and $9,000. (App. 6.) Petitioners refuse to recognize these facts and continue to posit arguments that may have been significant before *Shrink*, but lack relevance when applied to the unique facts and circumstances of Montana's electoral landscape.

I. PETITIONERS' EFFORT TO MANUFACTURE CONFLICTS IGNORES MORE RECENT DECISIONS FROM FEDERAL COURTS THAT HAVE UPHELD CONTRIBUTION LIMITS WITH SIMILAR SIZE OR IMPACT IN THE WAKE OF *SHRINK*.

Petitioners seek to manufacture conflicts between the Ninth Circuit's decision and decisions of the Sixth Circuit, the Eighth Circuit, and the Tenth Circuit and other federal courts that have "struck down comparably low limits." (Pet'r Br. at 17, citing *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995)) (striking down Missouri's limits of $300 and $100); and *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) (striking down Arkansas's $300 and $100 limits); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.2d 1174, 1183 (10th Cir. 2000). The Court in *Shrink* made clear, however, that the $1,000 limit upheld in *Buckley* was not "a constitutional minimum below which legislatures could not regulate." *Shrink*, 528 U.S. at 397.

In fact, the Eighth Circuit routinely has upheld contribution limits following *Shrink*. For example, in *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842-43 (8th Cir. 2000), the court, on remand, upheld Missouri's contribution limits of $525 for any state senate race and

$275 for any state house race. Similarly, in *Missouri Republican Party v. Lamb*, 270 F.3d 567 (8th Cir. 2001), the court applied *Shrink's* standards in upholding contribution limits that political parties may make to candidates. The court concluded that Missouri's limits did not drive the sound of a candidate's voice below the level of notice and political parties in Missouri "continue to have substantial avenues for expressing their support of their candidates and for maintaining a political and ideological solidarity with them" as independent expenditures remained unregulated. *Missouri Republican Party*, 270 F.3d at 571. Petitioners fail to mention these more recent cases.

Petitioners cannot point to a single decision since *Shrink* in which a court has struck down a contribution limit. In *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), the Court applied the *Shrink* standards in upholding a restriction imposed by the City of Akron that limits contributions to $300 against a freedom of association challenge. *See also North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498, 516-17 (E.D.N.C. 2000) (upholding North Carolina's $4,000 contribution limit to candidates or political parties); *Florida Right to Life, Inc. v. Mortham*, No. 98-770-Civ-Orl-19A (M.D. Fla. Mar. 20, 2000) (reproduced in Montana's SER at 89) (upholding Florida's $500 limit on contributions to candidates). Counsel for Petitioners served as counsel for the parties challenging the limitations in both of the last two citations and elected not to appeal the district court's rulings. Once again, MRLA ignores entirely these post-*Shrink* decisions.

Petitioners cite only in passing two significant decisions that have upheld contribution limits of similar amounts to those imposed under Montana law and, more importantly, imposed in states with similar populations and costs of elections as Montana. (Pet'r Br. at 14, 18), citing *Daggett*, 205 F.3d at 460, and *Landell*, 118 F. Supp. 2d at 479. MRLA suggests that these courts upheld the contribution limits only because the evidence showed "that spending had not declined in campaigns run under the limits." (Pet'r Br. at 18.) The courts in *Daggett* and *Landell* did not rely exclusively on the narrow question of whether spending had increased under contribution limits and, even if they had done so, the record in Montana is mixed on this issue. For example, total spending in House races in 1998, under contribution limits, *exceeded* the pre-limit amount from 1992 by more than 10 percent, while the total spending in all Senate races in 1998 was only $6000 less than the total in 1992. (ER 785-786.)

II. PETITIONERS SEEK TO TRANSFORM MONTANA'S CONTRIBUTION LIMITS INTO EXPENDITURE LIMITS IN A FAILED EFFORT TO GAIN STRICTER SCRUTINY.

Petitioners seek to transform Montana's contribution limits into spending limits in an effort to manufacture a conflict with decisions from other circuits that have struck down spending limits, "including contribution limits that functioned as spending restraints." (Pet'r Br. at 21.) Both the district court and the Ninth Circuit rejected similar claims.

A. The Evidence at Trial Confirmed That Political Candidates in Montana Continue to Raise Money in Quantities Sufficient to Run Effective Campaigns.

Petitioners presented the testimony at the trial of three witnesses who ran as legislative candidates in

Montana and claimed that the new limits preclude effective campaigning and thereby operate as spending limits. The district court found such evidence unpersuasive, especially in light of the fact that two of the candidates actually raised more money *after* the enactment of Montana's contribution limits. (App. 19.) Moreover, two of these three candidates successfully were elected to their positions, and the lone losing candidate admitted that his forced absence from Montana during a pivotal campaign period prevented him from raising sufficient funds to win. (App. 19.)

Nevertheless, Petitioners urge the Court to ignore the analysis developed in *Shrink* to evaluate contribution limits and, instead, to view Montana's *contribution* limits as *expenditure* limits and thereby apply stricter scrutiny. (Pet'r Br. at 19-22.) Petitioners contend that the low dollar amount of Montana's contribution limits have been "so radical in effect as to . . . drive the sound of the recipient's voice below the level of notice." (Pet'r Br. at 20, quoting *McConnell*, 124 S. Ct. at 677 (quoting *Shrink*, 528 U.S. at 397.)) The Ninth Circuit rejected such claims when it concluded that MRLA had failed to demonstrate that Montana's contribution limits prevented candidates "from amassing the resources necessary for effective advocacy, making a donee candidate's campaign to be not merely different, but ineffective." (Apps. 20, 21.)

As noted by the Ninth Circuit, the fact that Montana's contribution limits are low should come as no surprise "in light of the fact that Montana is one of the least expensive states in the nation in which to mount a political campaign." (App. 18.) For example, the only evidence in the record regarding the cost of television advertising indicated that a 30-second political spot in Montana costs $54. (ER 54.) Despite the low cost of television advertising in

Montana, legislative campaigns remain largely informal affairs. Legislative candidates campaign primarily door-to-door in an effort to reach voters in the average House district of 7,991 people and the average Senate district of 15,981 people. (App. 18.)

B. The Evidence at Trial Confirms that Electoral Competition in Montana Remains Robust.

Petitioners selectively cite to the record to support their claim that Montana's contribution limits shield incumbent officeholders from effective competition. (Pet'r Br. at 22-23.) Petitioners assert that electoral competition dropped in Montana after the onset of the contribution limits as evidenced by the alleged lack of competition in legislative races. (Pet'r Br. at 23.) Petitioners fail to mention, however, that the 2000 election in Montana generated a record number of total candidates in state elections and the fourth highest ever number of legislative candidates. (ER 315, 229.) The 2000 election marked the third election cycle to be conducted under the contribution limits.

Many factors likely contribute to the renewed robustness of electoral competition in Montana. The ability of political parties to contribute larger amounts of money played a role. Mont. Code Ann. § 13-37-216. Similarly, the ability of candidates to spend unlimited amounts of their own money and seek contributions from an unlimited number of persons and sources likely enhanced the ability of challengers to match incumbents in spending. By the 2000 election cycle, the average gap between challengers and incumbents in legislative races had narrowed to $65 per race. (App. 21.) This evidence presented to the district court belies Petitioners' claims that contribution limits have stifled democracy in Montana.

III. THE NINTH CIRCUIT PROPERLY RECOGNIZED THAT MONTANA'S AGGREGATE PAC LIMIT REPRESENTS A CONTRIBUTION LIMIT, RATHER THAN AN EXPENDITURE LIMIT.

Petitioners again argue that the Ninth Circuit applied an overly deferential standard of scrutiny to Montana's aggregate PAC limit. (MRLA Pet. at 27.) Specifically, Petitioners argue that the aggregate PAC limit impermissibly discriminates against PACs, that it is not closely drawn to serve Montana's anti-corruption purpose, and that it operates as an expenditure limit on PACs. (Pet'r Br. at 28-29.) All of these claims lack merit.

A. Montana's Aggregate PAC Limits Serve a Substantial Government Interest in Combating Corruption that Justifies Any Differential Treatment of PACs.

The Ninth Circuit found any differential treatment of PACs to be justified where the differential treatment is necessary to serve a substantial government interest. (App. 23.) The record in this case, including a letter from a state senator to his colleagues in which he urged them to vote for a bill in order to keep insurance industry PAC money in the Republican camp, and testimony by various members of the Montana legislature to the effect that PACs funnel money into state legislative campaigns to "get results," demonstrated that differential treatment of PACs was justified. (App. 23, citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990) (prevention of corruption justification sufficient to justify differential treatment of corporations).)

B. Montana's Narrowly-Drawn PAC Limits Permit Numerous Avenues for PACs to Associate with Candidates of Their Choice.

Petitioners allege that Montana's aggregate PAC limit is not narrowly drawn in that it unconstitutionally forces a candidate to reject a group's gesture of support. (Pet'r Br. at 28.) This claim fails to recognize that a candidate who has "PAC'd out" may return some money from one PAC to make room for other PAC money. In this way, Montana law does not infringe upon a PAC's freedom of association by allowing a candidate to accept contributions from an unlimited number of PACs. Yet, Petitioners dismiss a candidate's ability to return contributions in order to accept symbolic contributions from PACs as worse than "pointless" in that a candidate must expend "some quantity of time and money to refund it or another contribution." (Pet'r Br. at 28.)

The Ninth Circuit recognized, however, that PACs also retain the freedom, under Montana law, to associate with candidates in ways other than direct contributions. (App. 27.) PACs may volunteer services to a candidate's campaign, may endorse a candidate, or may independently buy advertising in support of a candidate. (App. 27.) More importantly, Montana's aggregate PAC limits do not restrict independent political expenditures and do not limit speech based on its content, and, therefore, the aggregate PAC limits do not warrant the type of strict scrutiny urged by MRLA. As a result, the Ninth Circuit correctly concluded that Montana's aggregate PAC limits are not "so radical in effect as to render political association ineffective, drive the sound of the candidate's voice beyond the level of notice, and render contributions pointless." (App. 27, quoting *Shrink*, 528 U.S. at 387-88.)

C. PACs Retain Numerous Avenues to Engage in Political Expenditures to Support the Candidates of Their Choice.

Finally, Petitioners' claim that the aggregate PAC limits operate as an expenditure limit on PACs ignores the reality of Montana law. The aggregate PAC limit does not prevent PACs from contributing unlimited amounts to political parties. (App. 5.) The aggregate PAC limit does not prevent PACs from spending unlimited amounts of money on independent political advertisements, including advertisements in support of a political candidate, as long as these independent expenditures are not coordinated with the candidate. (Apps. 5, 26.) And the aggregate PAC limits do not prevent PACs from otherwise engaging in unlimited amounts of political speech. (Apps. 5, 26.) The record at trial demonstrated that MRLA had failed to take advantage of any of these other avenues of political speech freely available to them under Montana law. (ER 124, 125, 126.)

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CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

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